Supreme Court of the United States, Petitioner asserting deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition raises issues under the Eighth and Fourteenth Amendments of the United States Constitution, as well as § 925.11, Florida Statutes (2001), and Rule 3.853, Florida Rules of Criminal Procedure (2001), as set forth in the Petitioner's Appendix at G-1 through G-13.

STATEMENT OF THE CASE

A. Basis for Federal Court Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to Rule 10(c), Rules of the Supreme Court of the United States and Title 28 U.S.C. § 1257(a), because the Court below, the Supreme Court of Florida, has ruled upon important constitutional questions in a way that conflicts with prior, relevant decisions of this Court.

B. Underlying Facts

Van Poyck was convicted of first-degree murder and sentenced to death following a botched attempt by Van Poyck and an accomplice, Frank Valdes ("Valdes"), to free James O'Brien ("O'Brien"), from a prison transport van in West Palm Beach, Florida.

The Supreme Court of Florida summarized the evidence at trial when it decided Van Poyck's direct appeal in *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990) (*Van Poyck I*). Briefly, on June 24, 1987, corrections officers Griffis and Steven Turner transported O'Brien from Glades Correctional Institution to a doctor's office in West Palm Beach. After the officers parked the prison transport van, they were confronted by Van Poyck

and Valdes, both armed with pistols. Van Poyck forced Turner from the van, took Turner's gun, and forced Turner beneath the passenger's side of the van. While Turner was squeezing under the van, he saw Valdes' feet as Valdes forced Griffis from the driver's side of the vehicle to the rear of the van. Almost immediately, while Turner watched two sets of feet – Valdes' and Griffis' – at the rear of the van, "he heard a series of shots and saw Griffis fall to the ground." *Id.* at 1067.

Van Poyck and Valdes were tried separately, with Van Poyck being tried first. The primary factual dispute at trial was the identity of the triggerman. Van Poyck testified and denied shooting Griffis or even having seen it occur. Van Poyck's counsel argued that the evidence proved Valdes shot Griffis, while the State argued circumstantial evidence showed Van Poyck fired the fatal shots. Van Poyck was convicted of first-degree murder. During the penalty phase, the prosecutor again argued Van Poyck was the triggerman. The jury recommended a death sentence and the trial court followed its recommendation.[1]

On direct appeal, the Supreme Court of Florida held the evidence was insufficient to sustain a conviction of first-degree premeditated murder, and insufficient to sustain a finding that Van Poyck was the triggerman. *Id.* at 1069, 1070. Nonetheless, the court found sufficient evidence to sustain a conviction for first-degree felony murder, and upheld the death sentence pursuant to *Tison v. Arizona*, 481 U.S. 137 (1987). *See Van Poyck I*, 564 So. 2d at 1070-71. This Court denied *certiorari* review. *Van Poyck v. Florida*, 499 U.S. 932 (1991).

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[1] At Valdes' subsequent trial, he was also convicted and sentenced to death. In 1999, nine prison guards entered Valdes' cell and beat him to death. John Pacenti, *Inmate Beaten to Death, Says Ex-Guard*, Palm Beach (FL) Post, January 25, 2002, at 1A, *available on* WESTLAW, 2002 WLNR 1965015; Jenny Staletovich and Shirish Date, *Officials: Guards Killed Valdes*, Palm Beach (FL) Post, July 22, 1999, *available on* WESTLAW, 1999 WLNR 1833108. As a result, Van Poyck was transferred to a prison in Waverly, Virginia and is currently incarcerated there.

C. Facts Pertaining to Questions Presented

i. Pretrial and Trial Proceedings

Prior to trial it became evident that the identity of the triggerman was the central disputed factual issue, relevant to both phases of the trial. Just before trial, Van Poyck's attorney moved to continue the trial to give the defense time to have Van Poyck's and Valdes' clothes subjected to then-nascent DNA testing. R. 13. According to deposition testimony from the state's expert witnesses and pretrial discovery documents, Griffis was shot three times with a single 9mm pistol. According to the medical examiner, the first shot was a "contact wound" with the barrel of the pistol pressed against the back of the victim's head. This type of wound, according to expert testimony, would result in "blowback," whereby substantial quantities of blood and brain tissue would have been violently ejected back toward the shooter, who was necessarily standing next to the victim. RA. 1903.

Based on these facts, Van Poyck's attorney argued, the requested DNA testing was "crucial" to Van Poyck's defense because it would establish the presence of Griffis' DNA on Valdes' clothes and/or the absence of same on Van Poyck's clothes. RA. 317. Because it could reasonably be expected that Griffis' DNA would be on the clothes of the triggerman, this testing could exclude Van Poyck as the shooter. After hearing argument, the trial court granted a continuance for DNA testing. Inexplicably, however, Van Poyck's attorney did not have the clothes tested, and to date these clothes, which remain in state custody, have never been tested.

As anticipated, at trial the primary factual dispute involved the identity of the triggerman. Van Poyck testified at both the guilt phase and penalty phases, denying he was the shooter or that he had even witnessed the shooting. RA. 2582. The only testimony the State presented in rebuttal was that of

Officer Turner, the surviving prison guard. Turner stated that Van Poyck had stopped kicking him shortly before the fatal shots, and therefore he was not certain of Van Poyck's location when the shooting occurred. Turner also claimed to have seen the murder weapon in Van Poyck's hand. RA. 1431, 1443, 1685. Accordingly, the prosecutor vigorously argued at both the guilt and sentencing phases that Van Poyck was the shooter. In fact, the prosecutor emphasized the importance of the triggerman issue to the sentencing decision, arguing to the jury that it "was irrelevant to guilt phase and has more bearing as to the penalty." RA. 2913; 2932-46.

The case went to the jury under dual theories of first-degree murder: premeditated or felony murder. The trial court submitted to the jury an unorthodox "special verdict form." The jury was first instructed to unanimously determine if Van Poyck was guilty of "first-degree murder." It was then asked to more specifically determine if Van Poyck was guilty of "premeditated murder," "felony murder," and/or "both." Jurors were to check "premeditated murder" if *any* juror found Van Poyck guilty of only "premeditated murder," to check "felony murder" if *any* juror found Van Poyck guilty of only that offense, and to check "both" if *any* juror found Van Poyck guilty of both felony and premeditated murder. RA. 3046-47; Petitioner's Appendix at F-1 through F-9.

The jury returned a unanimous general guilty verdict on first-degree murder. With respect to the subcategories described above, the jury checked the box for "felony murder," and the box for "both." RA. 4138; Petitioner's Appendix at F1. This meant that anywhere from 1 to 11 jurors believed Van Poyck was guilty of premeditated murder and was, under the facts of this case, the triggerman.

At the penalty phase, the State continued to argue that Van Poyck was the triggerman. RA. 3511-12, 3522, 3524-25. Following the penalty phase, the jury recommended a sentence of death by a vote of 11 to 1. The trial court followed the

recommendation, sentencing Van Poyck to death. The court found four aggravators and no mitigation. The trial judge's sentencing order made specific reference to his belief that Van Poyck was the triggerman:

> The Court further finds that the State clearly presented com-petent and substantial evidence as to the crime of first degree felony murder and/or first degree premeditated murder *and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.*

Petitioner's Appendix at E-3 to E-4 (emphasis added). Thus, from 1 to 11 members of the jury, and the trial judge, expressed the belief that Van Poyck was or may have been the triggerman—and certainly were not able to consider or give effect to irrefutable, mitigating proof that Van Poyck was, in fact, not the shooter.

ii. <u>The Direct Appeal Decision</u>

On direct appeal, the Supreme Court of Florida specifically acquitted Van Poyck of premeditated murder and of being the triggerman because of insufficient evidence to support those theories. *Van Poyck I*, 564 So. 2d at 1069, 1070; Petitioner's Appendix at C-6, C-8. However, the Supreme Court found sufficient evidence to sustain a conviction for felony murder, and went on to uphold the death sentence under a cursory *Tison v. Arizona* analysis. As then allowed under *Cabana v. Bullock*, 474 U.S. 376 (1986)[2], the Court purported to make its own *Tison* factual findings:

> Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant

[2] This Court seemingly abrogated *Cabana* in *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002), which held a jury, not a reviewing court, must make factual determinations that are prerequisites for imposing a death sentence.

> in this crime. He and Valdez [sic] arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Id. at 1070-71.

iii. The 1997 Post-Conviction Appellate Decision

Following his direct appeal Van Poyck initiated post-conviction proceedings pursuant to Florida Rule of Criminal Procedure 3.850, raising, among other claims, ineffective assistance of counsel at the penalty phase. The trial court conducted an evidentiary hearing during which a "vast array" of mitigating evidence was uncovered and presented. *Van Poyck v. State*, 694 So. 2d 686, 700 (Fla 1997) (*Van Poyck II*) (Anstead J., dissenting), Petitioner's Appendix at D-31. Van Poyck's sentencing jury and judge had never seen any of this evidence. The trial court denied all of Van Poyck's 3.850 claims, and on appeal, the Supreme Court of Florida, in a 4-3 split decision, affirmed the lower court's denial. Petitioner's Appendix at D-1 through D-34. Three Supreme Court Justices filed a lengthy dissent, chastising trial counsel's complete failure to investigate and prepare for the penalty phase. *Id.* at 699-700 (Anstead, J., dissenting); Petitioner's Appendix at D-30-D-31.

iv. The Post-Conviction Motion and Appellate Decision Below

On September 30, 2003, Van Poyck filed his Motion for Post-Conviction DNA Testing in the trial court pursuant to Florida Statute § 925.11, and Florida Rule of Criminal Procedure 3.853. The statute and implementing rule affords all prisoners a right to obtain post-conviction DNA testing if they

meet the pleading requirements. To obtain relief, the prisoner must demonstrate:

> ... there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

Fla.R.Cr.P. 3.853(c)(5)(C).

Van Poyck's motion requested DNA testing of the clothes he and co-defendant Valdes wore on the day of the homicide. All of the clothing – Van Poyck's, Valdes' and Griffis' – was admitted into evidence and remains part of the record in this case. RA. Exs. 42-44 (victim's clothing); Exs. 84-85 (Valdes' shirt and pants); Exs. 86-87 (Van Poyck's shirt and pants). All of the clothing is stained with blood, which can be DNA tested.[3] Trial testimony demonstrated the gunshot to Griffis' head was a "contact" wound, which meant the victim's blood would be spattered out of both the entrance and exit wounds. RA. 1903, 1917, 2207. Thus, the shooter would have the officer's blood on his clothing, and the non-shooter would not.

The motion affirmatively asserted DNA testing would reveal the presence of the victim's DNA on Valdes' clothes and the absence of the victim's DNA on Van Poyck's clothes. Van Poyck argued this evidence would conclusively establish Valdes was the triggerman, and would thus be powerful mitigating evidence that would create a reasonable probability that Van Poyck would have received a lesser sentence if the DNA evidence had been admitted at trial. The motion emphasized Van Poyck's Eighth Amendment right to have his capital sentencers – who again had found that he was the triggerman – consider and give effect to compelling mitigating

[3] Van Poyck's clothing is stained with blood because, after the shooting, Van Poyck and Valdes fled the scene, crashed their vehicle, and sustained injuries.

evidence that he was not the shooter and did not see the killing occur.

In response to Van Poyck's motion, the State conceded that Van Poyck was not the triggerman. But, it argued, this essentially "did not matter" because 1) the Supreme Court of Florida had determined on direct appeal Van Poyck was not the shooter, but had nonetheless upheld the death sentence pursuant to *Tison v. Arizona*; and 2) the trial prosecutor had not *exclusively* argued to Van Poyck's jury that he was the triggerman, but had also argued a felony murder theory. On February 24, 2004, the trial court summarily denied Van Poyck's motion.

Van Poyck appealed to the Supreme Court of Florida, asserting among other things, error under the Eighth and Fourteenth Amendments. Van Poyck again argued he had a right to have his capital sentencer consider the substantial mitigating factor that he was not the triggerman. He also argued the trial court completely overlooked the wealth of exculpatory evidence that was not presented at trial, but was discovered during postconviction proceedings.

On May 19, 2005, the Supreme Court of Florida handed down the Decision sought to be reviewed here, *Van Poyck v. State*, 908 So. 2d 326 (Fla. 2005) (*Van Poyck III* or the "Decision"); Petitioner's Appendix at A-1 through A-12. The majority stated the general issue to be decided as follows: "The issue before the Court is whether DNA evidence establishing that Van Poyck was not the triggerman creates a reasonable probability that Van Poyck would have received a lesser sentence." *Id.*; Petitioner's Appendix at A-6. In conducting its analysis, the Court assumed that Van Poyck was not the triggerman, and therefore implicitly assumed the requested DNA testing would conclusively establish this fact.[4] *See id.* at

[4] This concession was in keeping with the fact that the State never challenged Van Poyck's ability to produce the exculpatory DNA evidence. Moreover,

329-30; Petitioner's Appendix at A-6-A-9. The Court nonetheless held as a matter of law that there could be "no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial." *Id.* at 330; Petitioner's Appendix at A-9. In reaching this holding, the Court did not address Van Poyck's argument that he had an Eighth Amendment right to have his sentencers consider and give effect to substantial mitigating evidence that he was not the triggerman. Rather, the Court simply observed that the sentencing court had not explicitly relied upon triggerman status as a basis for the sentence, and thus there was "no reasonable probability" such status would have made a difference to a jury or judge. The Court also noted that it had, in 1990, upheld Van Poyck's death sentence under *Tison v. Arizona*.

Justice Anstead, in dissent, took issue with the majority's analysis:

> Today's ruling tells us that for purposes of assessing culpability between codefendants, it makes no difference who the actual triggerman was. I cannot accept that proposition generally, or as it is applied in this case . . . Common sense and our death penalty jurisprudence tell us that there is a vast difference in the importance of the defendant being the trigger-man in a shooting death for purposes of evaluating the defendant's guilt (where it is not essential), compared with an assessment of a defendant's culpability for purposes of evaluating whether he should receive the death penalty.

Van Poyck III, 908 So.2d at 331 (Anstead, J. dissenting); Petitioner's Appendix at A-9. Justice Anstead emphasized the

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because no evidentiary hearing was conducted, well-established case law mandated all of the factual allegations in Van Poyck's post-conviction motion be accepted as true. *See, e.g., McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002).

crucial role the triggerman theory played in both Van Poyck's conviction and his sentence, quoting from the trial record to show the prosecutor urged the jury to find Van Poyck was the triggerman. Thus, Justice Anstead noted: "We need only examine the trial record in this case to see explicit proof that the identity of the triggerman was both important and at issue in the jury's assessment of the appropriate penalty for Van Poyck." *Id.*; Petitioner's Appendix at A-10.

The dissent further observed that the majority had chosen to deal with a "hypothetical situation" which was "could the death penalty be imposed on a non-triggerman," rather than dealing with the actual situation before the Florida Supreme Court, in which "the State sought the death penalty, asserting as grounds that the defendant was the triggerman, and the jury returned with a vote for the death penalty." *Id.* at 332; Petitioner's Appendix at A-11.

Van Poyck filed a timely Motion for Rehearing and/or Clarification, in which he argued the Decision was contrary to decisions of this Court, including *Parker v. Dugger*, 498 U.S. 308 (1991), because the Florida Supreme Court failed to weigh the totality of the available mitigating evidence before denying relief. Petitioner's Appendix, at L1-L9. The Court denied the rehearing motion on July 15, 2005. *Van Poyck v. State*, 906 So. 2d 1061 (Fla. 2005); Petitioner's Appendix at B1.

REASONS FOR GRANTING THE WRIT

Modern technology has offered new opportunities to the criminal justice system to better ensure just and fair results. At the forefront of this technology is DNA testing – the ability to determine the identity of the perpetrator, victim, or both to a given crime, to a virtual mathematical certainty, through microscopic analysis of blood, hair and other bodily tissue. This technological advance has not gone unnoticed by the states. Currently, at least 33 states and the District of Columbia have now enacted post-conviction DNA statutes that extend to

defendants the right to seek DNA testing upon a threshold showing that such evidence will yield exonerating or mitigating evidence sufficiently likely to change the outcome of the original sentence.[5]

This Court has yet to weigh in on what, if any, standing this technology has under the Constitution. The Court's multiple opinions in *Herrera v. Collins*, 506 U.S. 390 (1993) collectively suggest there may in fact be post-conviction rights in this area under the Eighth and Fourteenth Amendments, a

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[5] Arizona (Ariz. Rev. Stat. § 13-4240 (2001)); Arkansas (Ark. Code Ann. § 16-112-202 (Michie 2001)); California (Cal. Penal Code § 1405 (West 2000)); Connecticut (Conn. Gen. Stat. Ann. § 52-582 (West 1991 & Supp. 2002)); Delaware (Del. Code Ann. tit. 11, § 4504 (2001)); District of Columbia, (D.C. Code Ann. § 22-4033 (2002)); Florida (Fla. Stat. Ann. § 925.11 (West 2002), Fla. R. Crim. P. 3.853 (2002)); Georgia (Ga. Code Ann. § 5-5-41 (West 2005)); Idaho (Idaho Code § 19-4902 (Michie 1997 & Supp. 2001)); Illinois (725 Ill. Comp. Stat. Ann. 5/116-3 (West Supp. 2002)); Indiana (Ind. Code § 35- 38-7-1 to 35-38-7-19 (2001)); Kansas (Kan. Stat. Ann. § 21-2512 (2001)); Kentucky (Kentucky Rev. Stat. § 422.285 (2005)); Louisiana (La. Code Crim. Proc. Ann. art. 926.1 (West 2001)); Maine (Me. Rev. Stat. Ann. tit. 15, § 2138 (West 2001)); Maryland (Md. Code Ann., Crim. Proc. § 8-201 (2001)); Michigan (Mich. Comp. Laws § 770.16 (2001)); Minnesota (Minn. Stat. Ann. § 590.01 (West 2000 & Supp. 2002)); Missouri (Mo. Ann. Stat. § 547.035 (West Supp. 2002)); Nebraska (Neb. Rev. Stat. § 29-4120 (2001)); New Jersey (N.J. Stat. Ann. § 2A:84A-32a(a)(1)(a) (West 2002)); New Mexico (N.M. Stat. Ann. § 31-1A-2 (Michie 2003)); New York (N.Y. Crim. Pro. Law § 440.30(1-a) (McKinney 1994 & Supp. 2001-2002)); North Carolina (N.C. Gen. Stat. § § 15A-269 to -270 (2002)); Oklahoma (Okla. Stat. Ann. tit. 22, § § 1371-1371.2 (West Supp. 2002)); Oregon (Or. Rev. Stat. tit. 14, ch. 138 (Or. 2001)); Pennsylvania (42 Pa. Cons. Stat. Ann. § 9543.1 (West 2002)); Rhode Island (R.I. Gen. Laws § 10-9.1 (2002)); Tennessee (Tenn. Code Ann. § 40-30-401 to 40-30-413 (2001)); Texas (Tex. Code Crim. Proc. Ann. art. 64.01, 64.03 (Vernon Supp. 2002)); Utah (Utah Code Ann. § 78-35a-301 (2001)); Virginia (Va. Code Ann. § § 19.2- 327.1 to -327.6 (Michie Supp. 2001)); Washington (Wash. Rev. Code Ann. § 10.73.170 (West Supp. 2002)); Wisconsin (Wis. Stat. § 974.07 (2001)). *See* Daina Borteck, *PLEAS FOR DNA TESTING: WHY LAWMAKERS SHOULD AMEND STATE POST-CONVICTION DNA TESTING STATUTES TO APPLY TO PRISONERS WHO PLED GUILTY*, 25 Cardozo L. Rev. 1429, 1429 n.4 (2004).

view shared by some commentators and judges. *See, e.g., Harvey v. Horan*, 285 F.3d 298, 312 (4th Cir. 2002) (Luttig, concurring); Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 565 (2002); Boemer, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 Wm. Mitchell L. Rev. 1971, 1984 (2001).

This petition does not need to – and does not – assert a bare constitutional right to DNA testing; Florida has already created such a right through its enactment of Florida Statute § 925.11, which permits DNA testing where there is a "reasonable probability" that such testing would exonerate the defendant or mitigate the defendant's sentence. Rather, the question presented in this Petition is under what circumstance can Florida – or any state – constitutionally *extinguish* such a right. Specifically, can Florida deny this defendant a statutory right to DNA testing, which he seeks to mitigate his sentence by showing that the sentencer's factual premise that he was the triggerman in a premeditated murder was false, on the grounds that it "would not matter" whether he was the triggerman or not.

In this respect, this Petition presents two compelling questions of constitutional law. First, is whether and the extent to which DNA testing allowed under a state statute is guided by and subject to constitutional safeguards. Van Poyck contends that DNA testing is, at a minimum, subject to the general rule, established in previous cases, that where a state creates or extends a right, it must administer that right in accordance with constitutional safeguards that guarantee a fair opportunity to defendants to avail themselves of that right. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985).

The second question raised herein – corollary to the first – concerns the Florida Supreme Court's troubling new legal rule articulated in extinguishing the right in this case: that a defendant's status as a triggerman or non-triggerman is

irrelevant to a death sentence, so long as the defendant meets the threshold, death *eligibility* standard set forth in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137(1987). This issue pertains to an important chapter in this Court's on-going volume of death penalty jurisprudence: the "non-triggerman" defendant, whose murder conviction and death sentence arises solely out of the doctrine of felony murder. *Enmund/Tison* articulates a constitutionally-mandated threshold standard that must be met in such cases. Specifically, a felony murder defendant is eligible for the death penalty only if he was a major participant in the felony that led to the killing, and actually killed, attempted to kill or intended to kill by exhibiting a reckless disregard or indifference for human life.

Other cases before this Court have involved the issue of when a known accomplice to a murder – someone who was there but did not kill – is eligible for death under *Enmund/Tison*, and what role the appellate court plays in the process. *See, e.g., Cabana v. Bullock*, 474 U.S. 376 (1986). This Court very recently suggested such status is an important consideration to the sentencing process in *Bradshaw v. Stumpf*, __ U.S. __, 125 S.Ct. 2398 (2005). The Court has not, however, clearly instructed lower courts on any guidelines governing the factual question of the identity of the triggerman when that issue is in question, or what constitutional impact errors concerning the identity of the triggerman might have on whether a death sentence is ultimately constitutionally permissible. Perhaps as a result courts below are now divided on this point, with Florida now taking the extreme position that beyond the question of death eligibility, the issue of triggerman status is irrelevant *as a matter of law* to the ultimate determination of whether a defendant lives or dies.

This Petition presents the opportunity to offer significant guidance and clarification on this issue. Van Poyck stands sentenced to death for a killing he neither committed nor intended. Perversely, however, his death sentence was imposed by a jury and trial judge who believed he actually killed the

victim. It can now be shown by DNA evidence beyond any doubt that the jury and trial court were wrong: Van Poyck was not the triggerman, nor was he guilty of premeditated murder. Many state and federal courts to date have ruled such evidence to be highly relevant, and potentially mitigating, to a death sentence. Florida, however, has now announced a new legal rule: such evidence is neither relevant nor mitigating; it simply does not matter what the jury and trial court believed, or whether the defendant was the triggerman, so long as the threshold *Enmund/Tison* standard is met. Because the new rule conflicts with decisions elsewhere, and conflicts with any number of more general principles articulated by this Court, Van Poyck submits it is worthy of this Court's review by *certiorari*.

ARGUMENT I

THE FLORIDA SUPREME COURT CANNOT EXTINGUISH VAN POYCK'S STATUTORY RIGHT OF DNA TESTING IN A MANNER THAT IS INCONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS.

By statute, Florida has extended to criminal defendants a right of DNA testing upon a showing that there is a "reasonable probability" that the defendant "would have received a lesser sentence." Fla. Stat. § 925.11. The Florida Supreme Court did not allow Van Poyck to exercise that right, reasoning that his status as the triggerman, even if wrongly decided by the jury and trial court, was legally irrelevant to his sentence, since the threshold *Enmund/Tison* death eligibility standard had been previously found satisfied.[6]

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[6] The Florida Supreme Court purported to justify its ruling on the bases that the murder arose out of "a brutal armed attack planned by Van Poyck" and that the victim was a prison guard. These facts at best go to *Enmund/Tison* death eligibility; they do not form the basis for a conclusion that the identity of the triggerman is legally irrelevant, particularly since the requested DNA

This ruling has constitutional implications. Where a state creates or extends a right, it must administer the right in accordance with due process. Once a state chooses to create a liberty or property right, it "may not withdraw that right...absent, fundamentally fair procedures." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). That is because once a state has created a liberty or property interest, it "has real substance and is sufficiently embraced within [the] Fourteenth Amendment" such that it cannot be extinguished without "those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

Here, because Florida has created a right to post-conviction DNA testing where it would potentially mitigate a sentence, it cannot withdraw that right absent "fundamentally fair procedures," (*Goss*, 419 U.S. at 574) or, put another way, "minimum procedural safeguards." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). This Court has repeatedly reaffirmed and expanded the principal that, where a state creates a right, it can only terminate that right through due process of law. In *Goldberg*, this Court held due process required that a pre-termination evidentiary hearing be held before public assistance payments to a welfare recipient are discontinued. *See Goldberg*, 397 U.S. at 261. This was so because, "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights." *Id.* at 262. Thus, a pre-termination hearing was required as a "minimum procedural safeguard[]" "demanded by rudimentary due process." *Id.* at 267.

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testing would confirm Van Poyck's testimony that he did not witness the killing or intend for it to occur.

Similarly here, the right to obtain post-conviction DNA testing is a matter of statutory entitlement in Florida if it has the potential to mitigate a sentence. As such, the termination of that right "involves state action that adjudicates important rights," and Florida must abide by minimum procedural safeguards in extinguishing the right. As discussed more fully below, in holding there was no "reasonable probability" Van Poyck's sentencers would have been persuaded to spare his life had they been able to consider DNA evidence conclusively establishing he was not the triggerman, Florida acted so arbitrarily as to deny Van Poyck due process.

Indeed, because the ability to access DNA testing could mean the difference between life and death, Van Poyck's interest in receiving due process seems all the more weighty in comparison to some of the other instances in which this Court has held the termination of a state-created right must accord with due process. In *Goss*, for example, the Court held students facing temporary suspension from public school were entitled to notice of the charges against them and an opportunity to present their version to authorities. *See Goss*, 519 U.S. at 583-84. This procedure was required because Ohio created a statutory right of free public education for all resident children. *See id.* at 573. "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent, fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574.

The fact that the entitlement was a creature of state law did not deter this Court from intervening. Although this Court recognized Ohio possessed "concededly very broad" authority to prescribe and enforce standards of conduct within its schools, the Court held that authority "must be exercised consistently with constitutional safeguards." *Id.* Therefore, the Court held a state may not take away a student's statutory entitlement to public education "without adherence to the minimum procedures required by [the Due Process] Clause." *Id.* Similarly here, although Florida possesses broad authority to

prescribe and enforce the standards under which an individual may access post-conviction DNA testing, it must exercise its authority consistent with constitutional safeguards, including the Due Process Clause.

In *Wolff*, this Court held that prisoners who were to be deprived of "good-time" credits be afforded advance written notice of their claimed misconduct, a written statement of fact findings, and the right to call witnesses and present documentary evidence. *See Wolff*, 418 U.S. at 558-59. In so holding, the Court stated:

> The touchstone of due process is protection of the individual against arbitrary action of government. Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

Id. at 558. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the Court held due process guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *See id.* at 391. In so holding, the Court noted the "Fourteen Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective.'" *Id.* at 392. This due process right arose because the state had created appellate courts as "'an integral part of the...system for finally adjudicating the guilt or innocence of a defendant.'" *Id.* at 393 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Moreover, because the "touchstone of due process is protection of the individual against arbitrary action of government," (*Wolff*, 418 U.S. at 558) a state may not satisfy the demands of due process simply by putting in place a system

designed to administer state-created rights. Rather, the state must behave fairly in the way it administers those rights. In *Evitts*, this Court emphasized that it was not enough to simply set up a system of appeals as of right. Rather, the state must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Id.* at 404 (citing *Griffin*, 351 U.S. at 17; *Douglas v. California*, 372 U.S. 353, 357 (1963)).

While the rule that states must administer rights they create in accordance with due process has not been considered in the context of DNA testing, there is no reason it should not be fully applicable in such a context. Indeed, *Evitts* and its progeny suggest that the practical effect of Florida's passage of a DNA statute is to import federal constitutional safeguards applicable to the death penalty generally into the Florida DNA statute, for it can hardly be claimed that an application that does not comport with those minimal safeguards is reasonable. Put more simply, the rule should be that Florida courts cannot extinguish a defendant's right of DNA testing in a manner that does not comport with Due Process and Eighth Amendment principles pertaining to a defendant's right to present mitigating evidence generally.

ARGUMENT II

THE FLORIDA SUPREME COURT DEPRIVED VAN POYCK OF DUE PROCESS AND AN INDIVIDUALIZED SENTENCING DETERMINATION WITH ITS *PER SE* RULE THAT EVIDENCE SHOWING HE WAS NOT THE TRIGGERMAN WAS IRRELEVANT IN DETERMINING WHETHER HE WAS PROPERLY SENTENCED TO DEATH.

The new rule articulated by the Florida Supreme Court – evidence that a capital defendant was not the triggerman is legally irrelevant in determining the appropriateness of a death sentence – is in clear conflict with

prior holdings of this Court and violates any number of basic constitutional principles repeatedly reaffirmed by this Court.

Just last term—and after the Florida Supreme Court's decision in this case—this Court expressed the opinion that a capital defendant's triggerman status is a relevant sentencing consideration. In *Bradshaw v. Stumpf*, __ U.S. __, 125 S.Ct. 2398 (2005), the petitioner and his co-defendant committed armed robbery, during which one of the victims was shot to death. *See id.* at 2402. The petitioner steadfastly maintained he was not the triggerman. However, he entered a plea agreement under which he pleaded guilty to aggravated murder. The petitioner also pleaded guilty to one of three capital specifications, which made him eligible for the death penalty. *See id.* at 2403.

During the penalty hearing, the petitioner argued his co-defendant fired the fatal shots. The state, on the other hand, argued the petitioner was the triggerman. *See id.* The petitioner was sentenced to death. *See id.* Afterward, the co-defendant was tried by the same prosecutor. By the time of the co-defendant's trial, the prosecutor had obtained new evidence: testimony from the co-defendant's cellmate that the co-defendant had admitted firing the fatal shots. The prosecutor introduced this evidence, and argued the co-defendant was the triggerman. *See id.* at 2403-04.

Although this Court held the prosecutor's actions did not void the petitioner's guilty plea, it remanded as to sentencing, stating the prosecutor's use of inconsistent triggerman theories "may have a more direct effect on [the petitioner's] sentence, however, for it is at least arguable that the sentencing panel's conclusion about [the petitioner's] principal role in the offense was material to its sentencing determination...." *Id.* at 2407-08. What this Court did not decide – because it was not directly presented – was whether a

legal rule finding triggerman evidence irrelevant so long as *Enmund/Tison* standards are met can withstand constitutional scrutiny.[7]

Additionally, granting *certiorari* would allow this Court to resolve the conflict the Decision below created between Florida and most other states that have considered whether a capital defendant's triggerman status is relevant in considering whether to impose the death penalty. This conflict highlights the arbitrariness of the Florida Supreme Court's ruling. For example, Alabama has affirmed on a number of occasions the importance of the triggerman issue in determining the appropriateness of the death penalty. "'The fact that the defendant was the actual perpetrator of the crime, the triggerman, is an important and very significant factor to weigh in determining whether the defendant's sentence to death is excessive or disproportionate to the penalty imposed in the cases of his co-defendants....'" *Jackson v. State*, 516 So.2d 726, 757 (Ala. Crim. App. 1985) (quoting *Williams v. State*, 461 So.2d 834, 849 (Ala. Crim. App. 1983), *reversed on other grounds, Ex parte Williams,* 461 So.2d 852, 853 (Ala. 1984)). Indeed, the Alabama courts have repeatedly held that, because "[e]ach case must be evaluated on its own peculiar facts," evidence indicating the defendant was the triggerman is, standing alone, "sufficient to distinguish" the defendant from his or her non-triggerman co-defendant for purposes of imposing the death penalty. *Taylor v. State*, 808 So.2d 1148, 1201 (Ala. Crim. App. 2000); *see also McNair v. State*, 706 So.2d 828, 845 (Ala. Crim. App. 1997).

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[7] Based on the language in *Bradshaw*, this Court should, at the very least, grant Van Poyck's petition, vacate the Florida Supreme Court's judgment, and remand for further consideration by that court in light of *Bradshaw*, which, in contrast with the Florida Supreme Court's determination below, clearly articulates the relevance of non-triggerman status to the sentencing determination.

Therefore, on numerous occasions both the Alabama Supreme Court and the Alabama Court of Criminal Appeals have held the death sentence appropriate for a triggerman, even though non-triggerman co-defendants received lesser sentences. *See, e.g., McWhorter v. State*, 781 So.2d 330, 344 (Ala. 2000); *Hamm v. State*, 564 So.2d 469, 473 (Ala. 1990); *Irvin v. State*, __ So.2d __, 2005 W.L. 1491996 at *32 (Ala. Crim. App. 2005); *Wright v. State*, 494 So.2d 726, 740-41 (Ala. Crim. App. 1985); *Thomas v. State*, 460 So.2d 207, 214 (Ala. Crim. App. 1983).

Likewise, the courts of other states have affirmed the importance of the triggerman issue in determining the appropriateness of the death sentence. In *Hall v. State*, 241 Ga. 252, 259-60 (1978), the Georgia Supreme Court reversed the non-triggerman defendant's death sentence as disproportionate where the triggerman co-defendant received only a life sentence. Additionally, courts in several other jurisdictions have held a triggerman defendant's death sentence not disproportionate where non-triggerman co-defendants received lesser sentences.[8] Thus, the *per se* rule the Florida Supreme Court created in the Decision below – that a defendant's non-triggerman status is irrelevant for purposes of capital sentencing as long the defendant was a major participant in an armed attack on a prison guard – is in clear conflict with the holdings of these other jurisdictions. For that reason, this Court should grant *certiorari* to resolve the conflict and establish a clear rule that a capital defendant's constitutional rights are violated where a defendant under a death sentence is summarily deprived of the

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[8] *See, e.g., State v. White*, 194 Ariz. 344, 352 (1999) (holding death sentence appropriate for triggerman, even though non-triggerman co-defendant received lesser sentence); *People v. Ashford*, 121 Ill. 2d 55, 89 (1988) (holding death sentence not disproportionate to accomplice's lesser sentence because, as triggerman, defendant's "culpability was measurably greater than that of his accomplice"); *State v. Shaw*, 273 S.C. 194, 204 (1979) (holding defendants' triggermen status alone sufficient to justify death sentences where non-triggerman co-defendant received lesser sentence), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 69, n.5 (1991).

opportunity to show that he was not the triggerman on the grounds that such status is legally irrelevant.

By disregarding the significant role triggerman status plays in assessing the appropriateness of a death sentence, the Florida Supreme Court violated Van Poyck's rights under the Eighth and Fourteenth Amendments to "meaningful appellate review" of his sentence. This Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). "Meaningful appellate review" of Van Poyck's death sentence necessarily requires consideration of the effect DNA evidence showing he was not the triggerman would have had on his sentencers. This is so because the Constitution requires that capital sentencers be allowed to fully consider potentially mitigating evidence like the evidence Van Poyck seeks to present here. Because "'the imposition of death by public authority is . . . profoundly different from all other penalties,' the sentencer must be free to give 'independent mitigating weight to aspects of the defendant's character and record, *and to circumstances of the offense proffered in mitigation.*" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (emphasis added) (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); *see also Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

The right is not limited to *presenting* mitigating evidence; rather, a capital defendant also has a right to have the sentencer *give effect* to such evidence. *See Penry v. Johnson*, 532 U.S. 782, 788 (2001) (*Penry II*). These requirements ensure imposition of the death penalty reflects "'a reasoned *moral* response to the defendant's background, character, and crime.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*) (*abrogated on other grounds, Atkins v. Virginia*, 536 U.S. 304, 321 (2002)) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)). This Court insists on an "individualized consideration as a

constitutional requirement in imposing the death sentence." *Lockett*, 438 U.S. at 605.

Here, the Decision below deprived Van Poyck of his right to an individualized determination of the appropriateness of his death sentence by refusing to extend him a statutory right that expressly permits the use of DNA evidence if it could mitigate the sentence. In short, the Florida Supreme Court allowed the sentence to stand despite a false and highly relevant finding of fact that Van Poyck was the triggerman—and despite the potential existence of scientific proof affirmatively showing that he was not. It is impossible in such circumstances to reconcile this finding with the basic constitutional requirement that he receive an "individualized" determination that death is an appropriate sentence.

Additionally, the Florida Supreme Court's review of Van Poyck's death sentence ignored the constitutionally mandated procedure, applicable to weighing states, whereby the death penalty may be imposed only where the sentencer finds there are insufficient mitigating circumstances to outweigh specified aggravating circumstances. *See McCampbell v. State*, 421 So. 2d 1072, 1075 (Fla. 1982); *Jacobs v. State*, 396 So. 2d 713, 718 (Fla. 1981). Florida is a weighing state, and has split the weighing process in two. First, the jury weighs aggravating and mitigating circumstances, then the judge considers the jury result as part of its own weighing process. *See* Florida Stat. § 921.141; *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992).[9]

In a weighing state, a reviewing court can correct constitutional sentencing errors in capital cases by either: (1) reweighing the totality of available mitigating and aggravating evidence; (2) conducting a harmless-error analysis;

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[9] Because the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate, the jury's recommendation is entitled to great weight." *McCampbell*, 421 So. 2d at 1075.

or (3) reversing and remanding for re-sentencing. *See Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990); *Stringer v. Black*, 503 U.S. 222, 230-32 (1992). Where the state court does not remand for re-sentencing, its review is constitutionally adequate only where it clearly and specifically indicates which kind of analysis it conducted (reweighing or harmless-error). *See Clemons*, 494 U.S. at 748-49; *Sochor v. Florida*, 504 U.S. 527, 540 (1992). Additionally, the reviewing court must conduct a "thorough analysis" of the evidence and clearly weigh the totality of all available mitigating evidence. *See Stringer*, 503 U.S. at 230.

The Florida Supreme Court did not follow this procedure. First, it did not purport to conduct a harmless-error review. Indeed, the words "harmless error" do not appear in the Decision. This Court has repeatedly refused to presume a state court conducted harmless-error review where the opinion is less than absolutely clear on the matter. *See Clemons*, 494 U.S. at 741; *Sochor*, 504 U.S. at 540-41. Nor did the court expressly state it was conducting a reweighing. This is not surprising, because, as this Court noted in *Parker*, 498 U.S. at 319, the Florida Supreme Court generally does not reweigh aggravating and mitigating evidence in reviewing death sentences. *See also Sochor*, 504 U.S. at 539. Rather, the court usually either remands for re-sentencing or conducts harmless-error analysis. *See Parker*, 498 U.S. at 319-20.

Assuming the Florida Supreme Court was attempting to conduct a reweighing, its analysis was constitutionally deficient because it failed to consider the totality of mitigating evidence, which would have included, in addition to the mitigating evidence offered at trial and the DNA testing Van Poyck seeks, the "vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase." *Van Poyck II*, 694 So. 2d at 700 (Anstead, Kogan, and Shaw, J. dissenting). This evidence was proffered by Van Poyck and never disputed by the State or any court; yet was ignored by the trial court and Florida

Supreme Court in their summary denial of Van Poyck's motion for DNA testing.

These courts thus shirked their responsibility to evaluate the totality of mitigating evidence, both that adduced at trial and that presented through post-conviction proceedings in assessing whether the evidence was mitigating, as the statute—and as shown above, the Constitution—required.

In that respect, the Decision below parallels the Florida Supreme Court decision this Court reversed in *Parker*. There, because the Florida Supreme Court did not make explicit what sort of review it conducted, this Court remanded for re-sentencing:

> It is unclear what the Florida Supreme Court did here. It certainly did not conduct an independent reweighing of the evidence. In affirming Parker's sentence, the court explicitly relied on what it took to be the trial judge's finding of no mitigating circumstances. Had it conducted an independent review of the evidence, the court would have had no need for such reliance.

Parker, 498 U.S. at 319. The Court then re-emphasized that reviewing courts must either remand, reweigh, or conduct a harmless error analysis when reviewing a tainted death sentence: "[w]hat the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings." *Id.* at 320.

Similarly here, the Florida Supreme Court ignored the evidence of mitigating circumstances and misread the trial judge's findings regarding mitigating circumstances. The court

concluded the sentencers did not rely on the triggerman theory, despite the jury verdict form indicating as many as 11 jurors believed Van Poyck was the triggerman and the trial judge's statement that the prosecution presented competent evidence that Van Poyck pulled the trigger. The Florida Supreme Court ignored this evidence and simply affirmed Van Poyck's death sentence based on its own irrelevant 1990 direct appeal finding that a non-triggerman could be eligible for the death penalty under *Tison*. Thus, the Florida Supreme Court's Decision here did not constitute "meaningful appellate review." As in *Parker*, "there is a sense in which the court did not review [Van Poyck's] sentence at all" because "meaningful appellate review requires that the appellate court consider the defendant's actual record."

CONCLUSION

This Court should grant Van Poyck's Petition for *Certiorari* because doing so would allow this Court to announce that, where a state creates a right to post-conviction DNA testing, it must administer that right in accordance with due process and the dictates of the Eighth Amendment. Granting the writ would also allow this Court to announce clearly that the Due Process Clause, as well as the Eighth Amendment, require meaningful consideration of evidence that a capital felony murder defendant was not the triggerman. For these reasons,

the Petitioner respectfully requests that this Honorable Court grant his petition for a writ of *certiorari*.

Submitted this 5th day of December, 2005.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

No. SC04-696

WILLIAM VAN POYCK,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[May 19, 2005]

PER CURIAM.

William Van Poyck appeals an order of the circuit court summarily denying a motion for postconviction DNA testing under Florida Rule of Criminal Procedure 3.853. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the circuit court's denial of Van Poyck's motion for postconviction DNA testing.

FACTS AND PROCEDURAL HISTORY

The facts of Van Poyck's crimes were previously detailed by this Court on direct appeal as follows:

The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

> After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger....
>
> ....
>
> Van Poyck, testifying on his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

Van Poyck v. State, 564 So. 2d 1066, 1067-68 (Fla. 1990) (Van Poyck I). Van Poyck was convicted of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aiding in an attempted escape, and aggravated assault. See id. at 1068. Regarding the first-degree murder conviction, the jury found Van Poyck guilty of both first-degree premeditated murder and first-degree felony murder on a bifurcated verdict form, and recommended the death penalty by a vote of eleven to one. See id. The trial court followed the jury's recommendation and imposed the death penalty for the first-degree murder conviction. See id.

On direct appeal, we concluded that there was insufficient evidence to support Van Poyck's conviction for first-degree premeditated murder because the State's evidence was conflicting as to Van Poyck's location at the time of the murder. See id. at 1069. We concluded, however, that there was sufficient evidence to support the first-degree felony murder conviction. See id. We also held that the death sentence was a proportional punishment because the record established that Van Poyck was a major participant in the felony murder and that he acted with reckless indifference to human life since he knew that lethal force could be used during the commission of the felony. See id. at 1070-71. Thus, we affirmed Van Poyck's convictions and sentences.

In his initial postconviction motion, Van Poyck raised numerous claims, including that counsel was ineffective during the guilt phase for failing to present additional direct evidence, such as DNA tests, regarding the identity of the triggerman. See Van Poyck v. State, 694 So. 2d 686, 696-97 (Fla. 1997) (Van Poyck II). We affirmed the circuit court's order denying relief on this claim. See id. at 697. Subsequently, this Court denied Van Poyck's petition for habeas corpus relief, rejecting arguments that (1) Van Poyck was wrongfully forced to exhaust his preemptory challenges, (2) appellate counsel was ineffective on direct appeal, and (3) Van Poyck was convicted of criminal offenses that did not exist as a matter of law. See Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998); see also Van Poyck v. Singletary, 728 So. 2d 206 (Fla. 1998) (denying habeas corpus petition in unpublished order); Van Poyck v. Crosby, 860 So. 2d 980 (Fla. 2003) (denying habeas corpus petition in unpublished order), cert. denied, 541 U.S. 974 (2004). The United States Court of Appeals affirmed the denial of Van Poyck's petition for habeas corpus relief, concluding that (1) counsel was not ineffective during the penalty phase, (2) the trial court did not err in denying Van Poyck a continuance between the guilt and penalty phases, (3) counsel was not ineffective during the appellate proceedings, and (4) Van

Poyck's sentence was not based on an invalid aggravating factor. See Van Poyck v. Fla. Dep't of Corrections, 290 F.3d 1318 (11th Cir. 2002) (Van Poyck III).

Thereafter, Van Poyck filed a motion pursuant to Florida Rule of Criminal Procedure 3.853 seeking DNA testing of all of the clothing worn by Van Poyck and Valdez at the time the murder occurred. Van Poyck alleged that the DNA testing could establish that Valdez and not Van Poyck was the triggerman. Van Poyck further alleged that this evidence would mitigate his death sentence because the sentence was based on the mistaken belief that Van Poyck was the triggerman. In the alternative, Van Poyck asserted that he was entitled to an evidentiary hearing on the issue. The State opposed the motion, asserting that there is no reasonable probability that the identity of the triggerman would mitigate Van Poyck's sentence. The trial court summarily denied Van Poyck's motion seeking DNA testing, finding that "pursuant to exhibits contained in the court file which are incorporated herein as reference that there is no reasonable possibility that any DNA testing will result in exoneration or in a mitigated sentence." Van Poyck appeals the trial court's order summarily denying his rule 3.853 motion.

ANALYSIS

Rule 3.853 sets forth the procedures for obtaining DNA testing under section 925.11, Florida Statutes (2004). The rule provides that a petition for postconviction DNA testing must include, among other things, "a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime." Fla. R. Crim. P. 3.853(b)(3). The burden is on the movant to "demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 2004). Rule 3.853 requires the

court to make the following findings when ruling on a motion seeking postconviction DNA testing:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
>
> (C) Whether there is reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

Fla. R. Crim. P. 3.853(c)(5) (emphasis supplied).

In this case, the pleading requirements of rule 3.853 have been satisfied. The issue before the Court is whether DNA evidence establishing that Van Poyck was not the triggerman creates a reasonable probability that Van Poyck would have received a lesser sentence.[1]

During the penalty phase, the State argued in closing that the evidence supported a finding that Van Poyck was the triggerman, but even if the jurors were to find otherwise, they

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[1] Although not controlling on the issue before the Court, we note that prior to trial, defense counsel moved for a continuance in order to allow the defense to have the clothing worn by Van Poyck and Valdez testing using DNA testing procedures. Despite the fact that the trial court granted the continuance so that DNA testing could be conducted, the clothing was never tested.

could still recommend the death penalty if they concluded that Van Poyck played a major role in the felony murder and that he acted with reckless indifference to human life. Therefore, the State's theory that the death penalty was appropriate was not based primarily on Van Poyck's triggerman status. Similarly, the trial court did not rely on Van Poyck's triggerman status in imposing the death penalty. The trial court found that the death penalty was an appropriate sentence because the mitigating evidence[2] presented was insufficient to outweigh the aggravating circumstances.[3] See Van Poyck I, 564 So. 2d at 1068-69. None of the aggravating circumstances found by the trial court were based on Van Poyck's triggerman status.

In fact, the only indication that the trial court even considered Van Poyck's triggerman status is a passage in the trial court's order in which the court stated that the "State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree premeditated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis."

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[2] During the penalty phase, defense counsel presented four witnesses in mitigation who testified that (1) Van Poyck's father was frequently away from home and that his mother had passed away when Van Poyck was young; (2) for a period of time Van Poyck lived with a housekeeper who appeared to be strange and unstable; (3) Van Poyck's siblings had juvenile records; (4) Van Poyck was remorseful for his actions; and (5) Van Poyck was helpful to other prison inmates. See Van Poyck I, 564 So. 2d at 1068. Van Poyck also testified during the penalty phase, accepting responsibility for the fact that Officer Griffis was killed and expressing remorse for his actions. See id.

[3] The trial court found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence. See Van Poyck I, 564 at 1068.

(Emphasis supplied.) This statement demonstrates only that the trial court was uncertain whether Van Poyck shot and killed Officer Griffis, rather than a conclusion that Van Poyck was the triggerman. Despite this uncertainty, the trial court found that "[b]y all evidence Mr. Van Poyck was a major participant" in the felony murder.

The United States Court of Appeals' analysis of Van Poyck's petition for habeas corpus relief is also instructive. In reviewing Van Poyck's ineffective assistance of counsel claim, the circuit court addressed whether there was a reasonable probability that evidence establishing that Van Poyck was not the triggerman would have affected the trial court's imposition of the death penalty. See Van Poyck III, 290 F.3d at 1325-26. The circuit court concluded that upon considering the trial court's uncertainty whether Van Poyck was the triggerman and the prosecutor's closing arguments during the penalty phase, there was "no reasonable probability that, if Counsel had presented the additional evidence that [Van Poyck] was not the triggerman, the outcome of the sentencing phase would have been different." Id. at 1326.

Further, this Court did not rely on Van Poyck's triggerman status in affirming his death sentence on direct appeal. This Court stated that "[a]lthough the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime." Van Poyck I, 564 So. 2d at 1070. The Court concluded that the death sentence was a proportional punishment "[s]ince there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used." Id. at 1070-71. In reaching this conclusion, we observed that the death penalty is appropriate even when the defendant is not the triggerman if the defendant is a major participant in the felony and acted with reckless indifference to human life. See id. at 1070. Evidence establishing that Van Poyck was not the triggerman would not change the fact that he played a major

role in the felony murder and that he acted with reckless indifference to human life.

For the foregoing reasons, we hold that there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial. We do not hold, as Justice Anstead asserts, that it makes no difference in the capital sentencing process which of two codefendants actually committed the killing. Rather, we determine only that under the circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck and carried out with Valdez, DNA evidence indicating that Van Poyck was not the triggerman would not have created a reasonable probability of a lesser sentence, which is the standard for order DNA testing under Rule 3.853(c)(5)(C). Accordingly, we affirm the circuit court's order summarily denying Van Poyck's motion for postconviction DNA testing.

It is so ordered.

PARIENTE, C.J., and WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ.,
concur.
ANSTEAD, J., dissents with an opinion.
ANSTEAD, J., dissenting.

Today's ruling tell us that for purposes of assessing culpability between codefendants, it makes no difference who the actual triggerman was. I cannot accept that proposition generally, or as it is applied in this case. I respectfully dissent from the majority's determination that the proper identification of the triggerman in a homicide by shooting could have no bearing on the proper penalty to be imposed.

Common sense and our death penalty jurisprudence tell us that there is a vast difference in the importance of the

defendant being the triggerman in a shooting death for purposes of evaluating the defendant's guilt (where it is not essential), compared with an assessment of a defendant's culpability for purposes of evaluating whether he should receive the death penalty.[4] For example, in our initial review in this case, this Court found that the evidence was insufficient to prove that the defendant was the triggerman and guilty of premeditated murder, but the evidence was nevertheless sufficient to sustain a conviction for felony-murder. Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990).

We need only examine the trial record in this case to see explicit proof that the identity of the triggerman was both important and at issue in the jury's assessment of the appropriate penalty for Van Poyck. In this case, the prosecutor expressly argued to the jury during the penalty phase: "So again, it is important who the triggerman is. There is no doubt about it. It's important to your deliberations, okay." Subsequent to those statements the prosecutor told the jury: "So ladies and gentlemen, even though he says he was not the triggerman, I submit the evidence shows that he was, because the only eyewitness we have that actually saw the guns well enough to identify is Officer Turner. He is the one left alive here to tell you who had what gun."[5] Thus, there can be no

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[4] While there are numerous decisions from this Court standing for the proposition that the identity of the triggerman is critical in an assessment of the appropriate penalty, none illustrates the point better than Justice Grimes' separate opinion in Zerquera v. State, 549 So. 2d 189, 193 (Fla. 1989), where he expressed disagreement with the majority's remand for a new trial on guilt, while agreeing that a new penalty phase was necessary "[b]ecause the question of who did the actual shooting directly bears on whether Zerquera should receive the death penalty." 549 So. 2d at 193 (Grimes, J., concurring in part, dissenting in part).

[5] In addition, the trial court stated in its sentencing order:

> The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-meditated

doubt that the prosecution, in seeking the death penalty, asserted to the jury first, that it was important in their deliberations on the penalty to determine who the triggerman was, and, second, in this case, the evidence supported a determination that the defendant was the triggerman. The jury, of course, after this argument, returned with a recommendation for death.[6]

On the face of this record how can we possibly now conclude that the identification of the triggerman is irrelevant to the determination of whether the death penalty should be imposed? The prosecutor has already answered that question for us. The majority has chosen to deal with a hypothetical situation: could the death penalty be imposed on a non-triggerman, rather than dealing with the actual situation presented here where the State sought the death penalty, asserting as grounds that the defendant was the triggerman, and the jury returned with a vote for the death penalty.

Not much is being asked in this case, only that some evidence be re-examined to allow modern science and technology to inform us as to whether we can be more informed about who actually did the killing. The Legislature has authorized exploration of this new evidence if it could have an impact on the assessment of the penalty to be imposed for the crime. Surely, if it was available, the judge, the jury and this Court would all have wanted to consider this evidence at the time this case was tried so we could have greater confidence in our decision-making as to the defendant's culpability and our decision for life or death.

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murder and in realty presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

[6] This, of course, is the same jury that we determined was in error in finding the defendant guilty of premeditated murder.

An Appeal from the Circuit Court in and for Palm Beach County,

Richard I. Wennet, Judge - Case Nos. 87CF006736 A02 and 88CF011116 A02

Mark E. Olive, Tallahassee, Florida and Jeffrey O. Davis of Quarles and Brady, LLP, Milwaukee, Wisconsin,

for Appellant

Charles J. Crist, Jr., Attorney General, Tallahassee, Florida, And Celia A. Terenzio, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

APPENDIX B

SUPREME COURT OF FLORIDA

Friday, July 15, 2005

CASE NO.: SC04-696
Lower Tribunal Nos: 87 CF006736 A02,
88 CF011116 A02

WILLIAM VAN POYCK **vs.** **STATE OF FLORIDA**

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and/or Clarification is hereby denied.

PARIENTE, C.J., and WELLS, LEWIS, QUINCE, CANTERO and BELL, JJ.,
concur.
ANSTEAD, J., dissent.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

Served:

TERRI SKILES
JEFFREY O. DAVIS
MARK E. OLIVE
CELIA A. TERENZIO
HON. RICHARD I. WENNET, JUDGE
HON. SHARON BOCK, CLERK

APPENDIX C

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. 73,662

STATE OF FLORIDA,
Appellee.

[July 5, 1990]
Rehearing Denied Sept. 4, 1990

PER CURIAM:

William Van Poyck appeals his convictions for first-degree murder, attempted first-degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter and his sentence of death imposed for the first-degree murder conviction. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Van Poyck's convictions and sentences.

The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van.

Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

The jury found Van Poyck guilty of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. With regard to the first-degree murder charge, the jury was given a special verdict form which contained blanks for "premeditated murder," "felony murder," and "both." The jury returned the verdict form with "felony murder" and "both" checked and "premeditated murder" left blank.

In the penalty phase, the state presented Van Poyck's parole officer who testified that Van Poyck was on parole at the time of the incident and that he had three previous convictions, two for robbery and one for burglary. Other witnesses for the state included victims of these offenses. Van Poyck presented five witnesses in mitigation, including himself. A nurse from the Palm Beach County jail stated that he helped other inmates in various ways. His brother, who was also in prison, testified about their home life, explaining that their father was frequently away from home on business and their mother had passed away when Van Poyck was young. Van Poyck's aunt testified that for a period of time the family lived with a housekeeper, who appeared to be strange and unstable. Van Poyck's stepmother

testified about his family situation, noting that his brother and sister had juvenile records. She also indicated that Van Poyck felt remorse for his actions. Finally, Van Poyck testified in his own behalf, taking responsibility for the fact that Griffis was killed and expressing remorse for his actions.

By an eleven-to-one vote, the jury recommended the death sentence for the first-degree murder conviction. The trial judge imposed the death sentence and found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment in that he was on parole when he committed the act; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence to some person. In finding insufficient mitigating evidence to override the above aggravating factors, the trial judge stated in his order:

> The defendant presented evidence which attempted to show that he was under the influence of another person, to wit: his brother and/or Mr. O'Brien. This court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter- writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further, the defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The judge also rejected evidence of a difficult childhood:

> The only other potential mitigating circumstances for which evidence was presented was that ... Van Poyck's

> mother died when he was approximately eighteen (18) months of age. However, it was shown that he was subsequently raised in a good family and by people that cared for him. Further, the court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation.

The trial court also imposed upon Van Poyck six fifteen-year sentences for the six counts of attempted manslaughter, five years with a mandatory minimum of three for aggravated assault, fifteen years for aiding in an attempted escape, and life imprisonment for attempted first-degree murder. The trial judge stated that each of the above sentences should run consecutively.

Guilt Phase

Van Poyck raises the following six issues in the guilt phase of this appeal: (1) the trial court erred in not severing the multiple offenses in this case; (2) the evidence was insufficient to support a conviction for first-degree premeditated murder; (3) the evidence was insufficient to support a conviction for attempted first-degree murder; (4) the evidence was insufficient to support a conviction for aiding in an attempted escape; (5) the evidence was insufficient to support the convictions of six counts of attempted manslaughter; and (6) the convictions in issue (5) violated the rule of lenity.

With reference to the first claim regarding severance, all of the crimes arose out of a single criminal episode, which began with the unsuccessful attempt to free a prisoner and concluded in a police chase. We find that the trial court's denial of Van Poyck's motion to sever was consistent with Florida Rules of Criminal Procedure 3.150(a) and 3.152(a).

Bundy v. State, 455 So.2d 330 (Fla.1984), *cert. denied,* 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986); *Spivey v. State,* 533 So.2d 306 (Fla. 1st DCA 1988).

With regard to point two, we agree with Van Poyck that the evidence is insufficient to establish first-degree *premeditated* murder. The state's evidence was conflicting as to where Van Poyck was at the time of the killing. We note that the trial judge, in his sentencing order, was not sure of Van Poyck's whereabouts: "Van Poyck *may* have in fact been the individual who pulled the trigger and shot Fred Griffis." (Emphasis added.) Although the evidence was insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence.

The remaining issues concerning the sufficiency of the evidence and the violation of the rule of lenity are without merit. The evidence in this record clearly sustains those convictions.

Penalty Phase

Van Poyck raises fifteen issues in the penalty phase: (1) the trial court failed to properly consider the mitigating evidence; (2) the aggravating circumstance of knowingly creating a great risk of death to many persons is vague, overbroad, and capricious; (3) the trial court erroneously found the aggravating circumstance of knowingly creating a great risk to many persons; (4) the trial court erred in denying Van Poyck's request for limiting jury instructions on the aggravating circumstance of knowingly creating a great risk of death to many persons; (5) the trial court failed to direct the jury to make a mandatory factual determination concerning Van Poyck's participation as prescribed by the United States Supreme

Court's decisions in *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (6) the trial court failed to make the required factual findings required by *Tison* and *Enmund* in its sentencing order; (7) the trial court violated Van Poyck's right to a fair trial by refusing to excuse pro-death jurors and attempting to exclude jurors opposed to the death penalty; (8) Florida's death penalty statute is unconstitutional as applied to this case; (9) the trial court gave Van Poyck insufficient time to obtain adequate medical examinations; (10) the trial court erred with regard to sequestering the jury; (11) the trial court improperly considered Van Poyck's prior convictions; (12) the trial court erred in finding the existence of an aggravating circumstance which duplicated an essential element of felony murder; (13) Van Poyck was denied his right to effective assistance of counsel during the penalty phase of the trial; (14) the death sentence is not proportional under these facts; and (15) Florida's death penalty statute is unconstitutional. After fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding.

We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In *DuBoise v. State,* 520 So.2d 260 (Fla.1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman[7] and discussed proportionate punishment, stating:

> In *Tison* the Court stated that *Enmund* covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill

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[7] *See, e.g., Copeland v. Wainwright,* 505 So.2d 425 (Fla.), *vacated on other grounds,* 484 U.S. 807, 108 S.Ct. 55, 98 L.Ed.2d 19 (1987); *Jackson v. State,* 502 So.2d 409 (Fla.1986), *cert. denied,* 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987).

> nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' " Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that *major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.*"

Id. at 265-66 (citations omitted, emphasis added) (quoting *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

We note that, although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not

required to exercise any peremptory challenges with regard to those jurors and that issue is moot.

We find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause. Accordingly, we affirm each of Van Poyck's convictions and sentences.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

564 So.2d 1066, 15 Fla. L. Weekly S379

APPENDIX D

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v. No. 84324

STATE OF FLORIDA,
Appellee.

[March 27, 1997]
Rehearing Denied May 27, 1997

PER CURIAM:

William Van Poyck appeals an order entered pursuant to Florida Rule of Criminal Procedure 3.850, in which the trial court denied all relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm the denial of Van Poyck's motion for post conviction relief.

Facts

The facts of this case are detailed in our decision, reported in *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990), affirming Van Poyck's convictions and sentences. In summary, the relevant events unfolded as follows. On June 24, 1987, state inmate James O'Brien was transported to the office of a dermatologist by two corrections officers. Officer Griffis drove the van and was unarmed. Officer Turner was responsible for watching O'Brien, the two separated by a cage. Upon arriving at the dermatologist's office, Officer Turner turned his eyes downward looking for paperwork. When Turner looked back up, he saw Van Poyck, who had approached the van, aiming a

gun at his head. Officer Turner was forced out of the van and ordered to crawl underneath the vehicle. While Officer Turner was getting under the van, Frank Valdez, one of Van Poyck's accomplices, was approaching the driver's side of the van. Officer Turner, from underneath the van, saw Officer Griffis forced out of the van and taken to the back of the vehicle. Then, while noticing two sets of feet near the back of the van, he heard the gunshots that killed Officer Griffis. Officer Turner did say, however, that he was unable to testify as to Van Poyck's location when the shooting occurred. Officer Griffis was shot three times, once with the barrel of the gun placed to his head.

Van Poyck was tried and convicted for first-degree murder, attempted first- degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter. By a vote of eleven to one, the jury recommended that the penalty of death be imposed. The trial judge followed the jury's recommendation and sentenced Van Poyck to death. On direct appeal, Van Poyck raised six guilt-phase issues and fifteen penalty-phase issues. This Court, in our initial opinion, found the evidence could not sustain the conviction of premeditated murder but upheld the first-degree murder conviction on the theory of felony murder. After that pronouncement, we rejected or found harmless all other claims and affirmed Van Poyck's convictions and sentences.

Van Poyck then filed a motion to vacate his convictions and death sentence, pursuant to rule 3.850, on December 8, 1992. A substantial evidentiary hearing was held on multiple issues after which the lower court denied all relief.

In his appeal of that order, Van Poyck raises sixteen claims. We find that none warrant relief. Accordingly, we affirm the lower court's order.

Ineffective Assistance of Penalty-Phase Counsel

Van Poyck's first two claims center around the representation he received at the penalty-phase proceeding. He argues that his counsel was ineffective. We disagree. Further, he asserts that the lower court inappropriately limited his ability to prove the ineffective nature of his penalty-phase representation by refusing to reopen the evidentiary hearing or to supplement the record when an affidavit became available after the close of the proceedings. We also find no merit in this assertion.

Van Poyck's claim of ineffective penalty-phase representation is based on the allegation that his trial counsel, Cary Klein, failed to adequately investigate mitigating evidence of Van Poyck's problematic life and mental- health histories. The two-prong standard for evaluating an ineffective assistance of counsel claim, set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), requires: (1) that the defendant first demonstrate deficient performance by counsel; and (2) that the defendant then demonstrate that such deficient performance caused prejudice. Based on the record in this case, Van Poyck has not demonstrated deficient performance by his counsel.

At the outset, it must be understood that Van Poyck argues two distinct areas of deficiency. He argues that Klein should have investigated, discovered, and presented both his life history and his mental-health history. As to his claim regarding deficient investigation and presentation of mental- health evidence, we find that Klein had clear tactical reasons for avoiding such a line of argument. The following testimony from Klein at the evidentiary hearing below illuminates Klein's tactical considerations:

Q: [By prosecutor Geesey]:

During the course of your representation of this defendant, you've indicated that you obtained his jail records. Were you referring to Department of Corrections records?

A: Yes.

Q: When did you obtain those records and—

A: I don't recall exactly the date. It was fairly early on in the representation. I would say sometime by late fall we had gotten his DOC records or sometime by the winter.

Q: Why did you want his DOC records?

A: We sent away for his Department of Correction records because he had spent the last 15 or so years in the Department of Corrections. From the time he was 17 or so until maybe 6 months before the crime happened, that's where all of his time was spent. The Department of Corrections also had all of his mental health records from the time he was in DOC so we would need those, also.

One of the things we were looking for, and this was a suggestion of Mr. Van Poyck's, if he had a decent prison record or there were some people willing to testify that he could be a model prisoner, that might be a mitigating circumstance, a jury believing that he could be a model prisoner in the prison system might be willing to let him spend the rest of his life in the prison system so we sent away for those prison records.

The prison records also had his prior crimes, prior convictions, some of the judgments in them. It would have a lot of things we would need to help us prepare primarily for phase two but even, to some degree, for phase one. If we decided to have him testify, we'd need to know what convictions he had. That would be in Department of Corrections records.

Q: Obviously well may have.

Have you reviewed your time sheets and your billing from back in '87 and '88 recently?

A: No, I haven't, not since I submitted the bill on the case which was probably 4 to 6 months after the trial was over.

Q: Did you have any recollection of approximately how many hours you spent reviewing those DOC records?

A: I could only estimate. It had to take at least 10 hours. It took the better part of two complete days to get through most of the records and that's even with skimming some of them.

Q: And in those records, you were looking for what type of evidence, specifically?

A: *I was looking for, specifically, mental health records. I wanted to see what happened in the mid '70's, why he was—why he was sent to Chattahootchee, what the diagnosis was, the prognosis, why he came back.*

I was looking also, very specifically, for whether I could get anything out of his prison records that would be mitigating in terms of him being a model prisoner, a

good prisoner. Specifically, that is really the two specific things we were looking for.

Q: First of all, did you find anything in those records that would give you evidence that he was a model prisoner and that you could perhaps use as a non statutory mitigating circumstance?

A: No, I didn't find anything that was really helpful in that regard.

Q: And, in fact, was it fairly—how would you describe the number of disciplinary reports and the type of offenses he committed for those?

A: Well, he had several D.R.'s. He had quite a number of them. Obviously, he had done a lot of fighting in prison.

Q: Were there any weapon offenses for the D.R.'s?

A: I think there were one or two weapon offenses. He had had some escapes, also.

Q: Did you see anything in those records that you could use to establish a nonstatutory mitigating circumstance?

A: At one point I thought that I could take at least the 5 years of his prison record and use some of that because it got progressively better as he was there. The first 10 years or so he was in prison, it was horrible. As I guess he learned how to play the system, it got better but even in the last 5 years, I think he got one or two D.R.'s. I didn't think we could use any of that without having the previous 10 years come in from the State to make it look even worse than it was.

Q: You felt that it couldn't be done without opening the door?

A: Right.

....

Q: From your review of those records, did you believe that there was anything in there that would be of assistance in a penalty phase?

A: I thought the fact that he had been in Chattahootchee and the previous mental health encounters would be of some mitigating or might be of some mitigating use in phase two.

Q: At some point in time was there a decision made not to use that evidence?

A: Yes.

Q: When was that decision made?

A: Well, initially, the decision was made. Although it wasn't hard and fast, I was inclined not to use them. When I spoke to Mr. Van Poyck he explained to me that he had faked some of the brief mental illness. He faked the light bulb incident and we had a good laugh over that. And I probably would have used it, notwithstanding, if I had gotten some help later on from some mental health experts that perhaps he was, notwithstanding what he told me, he was still mentally ill.

Q: When did the defendant tell you that he had faked some of his mental health history and faked the incident with the light bulb?

A: Well, I'm trying to remember the first time it came up. I think the first time it came up I'm not sure Mike [co-counsel Dubiner] was even appointed. Actually, I think he was appointed, which meant it was probably the summer of '88. It was probably either late spring or summer of '88.

After Mike Dubiner was appointed, we had a conversation in the jail. He had told me that he denied that he was really sick in the '70's and he told me he had like made it all up to get out of the prison population to go to Chattahoochee.

Q: When the defendant told you this, did you question in your own mind whether or not he was being truthful with you?

A: Initially, no, I don't think I really questioned it. I think I accepted what he was telling me. He went into detail. I mean, he wasn't delusional, at the time. He had a pretty good recall of most of the facts and fairly decent sense of humor about the incident. He understood the circumstances, at the present time. What I did have is doubts, not about his truthfulness but I had doubts about why he was telling me that.

Q: Were you concerned about that?

A: Yes, I was pretty—

Q: *Let's go specifically into what the defendant told you in the summer of ' 88 about his faking.*
First of all, did the defendant say anything about any preparation before he began faking this mental illness?

A: *He told me that he had gone to the prison library and looked up some books on schizophrenia and mental*

illness, had done extensive reading on it in preparation for this charade.

Q: How long did he tell you that he had spent preparing and reading and studying for all of this?
A: He didn't tell me how long. I don't recall if he told me specifically how long but I got the impression he was fairly well—if he was telling me the truth, that he had prepared pretty well for it because he fooled the doctors, obviously, at Chattahoochee at Florida State Hospital.

Q: Did the defendant say how he was able to obtain these materials, read and study these materials? Did that seem consistent with his cognitive ability that he demonstrated to you in his legal research?

A: It did. It was probably one of the reasons I probably believed him without much doubt, yes.

Q: *And what did he say, specifically, about how he faked the mental history?*

A: *I think he explained to me how he made it appear that he was chewing on this light bulb.*

Q: *What did the defendant say about that?*

A: *I think he said he put something in his mouth that made a crunch or something like that and they were convinced he was eating a light bulb.*

Q: *Did he have light bulb parts?*

A: *Yes, he was like spitting out the little metal pieces. He didn't go into great detail about it but it was enough*

to convince me that he had pulled a little sleight of hand on them.

....

Q. Did you want to open the door to any evidence of the defendant's escape or attempted escape while incarcerated on other charges earlier in his life?
A. No.

Q. Did you think that would have a detrimental effect in seeking a life recommendation from the jury?

A. Clearly that would've had a detrimental effect. We did not want the jury to know this was not a person who could be trusted for life in prison.

Q. Earlier on defense counsel showed you State's Exhibit Number 2 and that it was a report of the defendant in 1977 stating that he had expected to end up on death row someday and he would not hesitate to destroy a snake in a brown shirt. Is that information that you would have wanted to come in front of a jury in a penalty phase?

A. No, I don't think so.

Q. Would you want to do anything to call attention to that document on the part of the prosecutor?

A. No.

Q. Also, in cross examination, the defense counsel asked you about the five years aggravation in the defendant's parole in 1980 because of his mental health history. That took place in 1980; correct?

A. Yes, and it was litigated for a number of years thereafter.

Q. After that occurred in 1980, was there any additional evidence of mental disturbance on the part of the defendant?

A. No.

Q. He was cured from that point on?

A. As far as I know he was mentally healthy for the remainder of the 80's.

Q. Concerning the issue of voluntary intoxication, was that successful for the codefendant?

A. No.

Q. Did you think it was a viable defense for your client?

A. No.

(Emphasis added.) This extended excerpt demonstrates that Klein had quite adequate reasons for limiting his use of the prison records and thereby limiting the presentation of Van Poyck's mental-health history. Further, Klein testified that Dr. Villalobos, after examining Van Poyck prior to the penalty phase, reported that Van Poyck was a sociopath. Indeed, Klein testified that Dr. Villalobos asked not to be called as a witness because his findings would not be helpful. This information only strengthens Klein's tactical choice. While we acknowledge that Klein's co-counsel Dubiner testified that they were unprepared for the penalty-phase proceeding and, in his opinion, should have spent more time preparing mental-health evidence for presentation, we will not second-guess Klein's clearly tactical choice. *See Cherry v. State*, 659 So.2d 1069,

1073 (Fla.1995)(concluding that present counsel's disagreements as to strategy does not necessarily satisfy *Strickland* because standard is not how present counsel would have, in hindsight, proceeded).

As to Klein's choices regarding the presentation of Van Poyck's life history during the penalty-phase proceeding, we likewise find no error. Evidence of Van Poyck's life history was adequately presented by Klein at the penalty-phase proceeding.[8] Indeed, the jury was actually aware of most aspects of Van Poyck's life that he now argues should have been presented. Klein testified to the following in the evidentiary hearing below:

> Q: Did you ask the defendant any questions to try and find out what you could do in a penalty phase?
>
> A: We discussed it constantly, constantly. He was very up on it.
>
> Q: What kind of questions?
>
> A: I asked him who I could contact, who I could call, who were your friends when you were kids? I didn't have any. Tell me about your family. Well, the only one still in contact is my stepmother and my brother, so on and so forth. I don't mean to tell you that he was directing what to do but he had a tremendous input, being intelligent and knowing the mitigating circumstances, both statutory and nonstatutory. We considered like a list of 18—I think it was 15, 16, 18 nonstatutory mitigating circumstances.

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[8] It must be noted that Van Poyck blurs the line between his life history and his mental-health history in this portion of his brief. To the extent that he reargues that Klein was deficient for failing to adequately investigate and present Van Poyck's mental-health history, we ignore such argument as it has been resolved above.

> In fact, I put them up in closing argument in phase two. I must have listed 12 or 13 nonstatutory [circumstances] that we could not actually prove other than the couple that we tried to prove that I suspected were there but none could we show.
>
> Q: Did you ask the defendant if he had ever been raped?
> A: We talked about that. He told me that he had not. He didn't have that many problems in jail; that he was able to take care of himself and they generally left him alone.

At the penalty-phase proceeding, defense testimony was presented by Deborah Chisholm, Jeffrey Van Poyck, Anne Van Poyck, Lee Van Poyck, and by Van Poyck himself. Chisholm was a nurse at the Palm Beach County Jail when she met Van Poyck. She testified that Van Poyck was a "very caring person, very friendly, very loving and very intelligent and somebody that I really enjoyed talking to." Further, she testified that Van Poyck had indicated to her that he did not kill Griffis and that he was sorry that the shooting had happened.

Jeffrey Van Poyck is Van Poyck's brother. Klein testified that he made the tactical decision to call Jeffrey Van Poyck for the following reason:

> One of the reasons why I called Jeff, I wanted Jeff to testify before the jury because I wanted these people to see that this was his only role model from the time he was a little baby. Jeff, who was his brother, I think was serving, at the time, I think a 40 year prison sentence for armed robbery.
>
> You had to be there to listen to this guy's testimony. I think he was the most cold and chilling witness I had ever seen on the witness stand. As it turned out, I think

> the jury hated this guy, couldn't stand him. But I felt like we had to call him because if I had tried to explain to [the] jury what kind of role model or influence he was, they wouldn't have believed me. I thought they had to see Jeff for themselves to understand how chilling, cold an influence this person would've had on Bill. But again, we had no psychological underpinning for it.

Jeffrey Van Poyck testified to the facts surrounding his mother's death. The defendant was very young when his mother passed away. Jeffrey Van Poyck then testified that his father hired Ms. Dano to take care of both the house and the children (Jeffrey, William, and Lisa). She was a strict disciplinarian. Indeed, she beat the three children until their father fired her at gunpoint. At that point, Jeffrey Van Poyck testified, Aunt Phyllis moved into the house and cared for the three children. She remained as caretaker until the elder Van Poyck (their father) married Lee Hightower. Finally, Jeffrey Van Poyck extensively testified to his life in crime (500 burglaries, he claimed, prior to his first arrest) and the influence such an example could have had on the defendant.

Anne Van Poyck was the defendant's aunt. She gave insight into Aunt Phyllis. First, she testified that Phyllis may not have been the woman's real name. Second, she testified that the children's natural mother was named Phyllis. Third, she revealed that Aunt Phyllis told the children that she was their real mother. Finally, her testimony was that she was not impressed with Aunt Phyllis' ability as a surrogate mother and that she considered Aunt Phyllis to be an unstable person.

Lee Hightower Van Poyck is the defendant's stepmother. Her testimony provided insight into the personality of the defendant's father, Walter Van Poyck. She stated:

Well, first of all, he was a very good man. He was a very kind man, a very caring man.

As you probably know, he was disabled. He lost his leg in World War II in the Holland invasion.

Consequently, he was not with the children as active as an ordinary father would be. He was unable to do certain things with the children, but he was a good father.

....

Let me say this: Walt Van Poyck loved his family. He has difficulty demonstrating that love. He was not demonstrative but he was kind and he was gentle and he was caring, but he wasn't outgoing with his affection.

Lee Hightower Van Poyck also verified that Aunt Phyllis had grown up being called Amy but changed her name to Phyllis at some point. She also thought that Aunt Phyllis was unstable. Finally, she opined that Jeffrey Van Poyck had been a bad influence on the defendant.

Notably, defendant Van Poyck then testified to the following:

Q. Mr. Van Poyck, you heard your mother testify today and you heard your brother testify about some remorse that you showed in writing some letters. *If you would forget for a second whatever letters you may have written, Mr. Van Poyck, how do you feel about the—about your actions regarding the incident of June 24, 1987?*

A. *Well, I take responsibility for the fact that—if I had not made a decision to free James O'Brien, Mr. Griffis would still be alive.*

Q. Mr. Van Poyck, you heard testimony about your brother, Jeffrey, and his influence on you. You heard Jeffrey testify. Is it Jeffrey's fault that you are the way you are today?

A. *I can't say that, no, sir.*

Q. *Why not?*

A. *I happen to believe that people should be responsible for their own actions.*

Q. Do you consider yourself a fairly intelligent person?

A. I would hope so.

(Emphasis added.) Clearly, Klein did an adequate job of presenting Van Poyck's life history. In sum, we conclude that Klein's performance was not deficient in presenting Van Poyck's mental-health and life histories. Indeed, Klein tactically avoided presenting (or opening the door to the presentation of) events severely disadvantageous to Van Poyck's cause. Accordingly, we find no merit to the claim that Van Poyck received ineffective assistance of counsel at the penalty phase of his trial.[9]

Van Poyck's second argument relating to his penalty-phase representation is that the court below erred in refusing to allow him to either supplement the record or to reopen the

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[9] We note that Van Poyck raised this same claim in his direct appeal. At that time we disposed of the issue by stating that "[a]fter fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding." *Van Poyck v. State*, 564 So.2d 1066, 1070 (Fla.1990). The State, however, argued in its direct-appeal brief that "[a]ppellee contends that the issue is improperly before this Court on direct appeal." As is proper, the State does not argue that the claim is procedurally barred in this collateral action. We choose to address this claim on its merits. For the reasons explained, though, we find that it has no merit.

evidentiary hearing on the post- conviction motion. The purpose of such reopening or supplementation would be to secure the affidavit or testimony of Dr. Villalobos in relation to his conversations with Klein. Dr. Villalobos presumably denies making certain statements to Klein. As noted earlier, Klein testified that Dr. Villalobos told him that Van Poyck was a sociopath. Indeed, the lower court cited this fact to bolster its conclusion that Klein's decisions were part of a tactical plan. It now seems that Dr. Villalobos, if allowed, would deny making such a statement.

In evaluating the impact of the judge's action, we must look at the type of claim Van Poyck raises. The trial judge's denial of Van Poyck's motion to reopen or to supplement is only harmful to him if the refused material would be determinative of a valid claim. In this case, Van Poyck is trying to use Dr. Villalobos' testimony or affidavit to prove ineffective assistance of penalty- phase counsel. If such ineffective assistance of counsel could not be proven even with the additional testimony or affidavit, any error in refusing to reopen or supplement would be harmless.

We have already stated that the record, as currently comprised, demonstrates no penalty-phase deficiency by Klein. Would the testimony or affidavit of Dr. Villalobos change that? Two large assumptions would have to be made in order to contemplate such a change. First, it would have to be assumed that Dr. Villalobos' testimony or affidavit would be given more credibility and weight than Klein's testimony. Second, it would have to be assumed that Klein's tactical decision as to mental-health evidence is crippled if he truly received no information from Dr. Villalobos (as the doctor claims) instead of negative information (as Klein claims). It is not at all clear that either of these assumptions is valid. In the first instance, Klein's testimony is quite convincing. Indeed, there is scant evidence that Klein's testimony even came as a surprise to Van Poyck. In the second instance, it must be remembered that Klein

testified that he was inclined to refrain from presenting mental-health evidence as mitigation unless a mental-health expert could actually say Van Poyck was mentally ill. Dr. Villalobos was not, by any account, prepared to make that statement. In fact, the affidavit signed by Dr. Villalobos (at issue in this particular motion) made no such affirmative claim. The affidavit reflects only that Dr. Villalobos had insufficient time to make any evaluation. Van Poyck attributes the insufficiency of examination time to Klein's deficient preparation. Even if Dr. Villalobos told Klein that he had insufficient time to offer any opinion, it is by no means certain that Klein would have been deficient for making the tactical decision to refrain from presenting (thereby halting his search for a mental-health expert) mental- health mitigation. As we have already demonstrated, Van Poyck's prison records were full of unsavory information that Klein has testified he wanted to keep from the jury. With this said, though, we will grant, arguendo, that both assumptions outlined above are valid and that Dr. Villalobos' affidavit or testimony would prove Klein's penalty-phase performance deficient. In such an event, Van Poyck still has to demonstrate that he was prejudiced. He cannot do so because this record will not support such a conclusion.

Any mental-health evidence that might have been produced would have been severely undermined by the contents of Van Poyck's prison records. Those records included extensive documentation as to examinations and conclusions by prison doctors. On September 26, 1975, Van Poyck was presented to the Forensic Unit Staff Conference. The conference was attended by doctors Ogburn, Dachtera, and Mehta. Their final diagnosis was that Van Poyck suffered from "Personality Disorder, Antisocial Type with Paranoid Features." Then, on November 20, 1975, Dr. Margarita Gonzalez examined Van Poyck. She diagnosed Van Poyck with: (1) personality disorder, antisocial type with paranoid features; and (2) drug abuse, multiple. On February 26, 1976, Dr. Delfina Johnson examined Van Poyck and found no psychosis at the

time. Once again, on May 27, 1983, Dr. Sotomayor evaluated Van Poyck and concluded that he did not "reveal any signs of psychosis." In fact, Van Poyck told Dr. Sotomayor that "[a]'int nothing wrong with me now. Am working and trying hard to behave myself." The following year, on June 6, 1984, another report was filed which found that "[s]ince Van Poyck exhibits an absence of any acute distress or mental disorder, treatment is not indicated and none is recommended." The prison records clearly contain an abundance of medical evidence indicating that Van Poyck's mental condition, if any, would not be mitigating in nature. Any testimony developed by the defense through mental- health experts would certainly be tempered by its inconsistency with the medical reports in the prison records. The records also contain the following information that would certainly be damaging to Van Poyck.

Over twenty prison disciplinary reports were filed against Van Poyck. Further, he had an attempted escape in his records. On that point, Klein specifically testified that he wanted to keep such information from the jury because of the negative impact it would have on seeking a life recommendation. The records also reflect that in March of 1977, Van Poyck was placed in administrative confinement after getting caught typing a letter to another inmate. In that letter he stated, "I know for a fact that I am going to end up on death row within a couple of years." He also stated, "I would not hesitate to destroy any snake in a brown uniform." It must also be remembered that Van Poyck admitted to Klein that he faked the light bulb incident. If Klein had proceeded to use the incident as mitigating in nature, he would have been faced with an ethical problem. He would have encountered a situation in which his duty of candor towards the court required the revelation of Van Poyck's admission. The problematic nature of such a predicament is obvious.

Even as we assume, arguendo, that Klein should have allowed more time for mental-health evaluations of Van Poyck

by experts, it cannot be denied that the force of the above information would probably dwarf any expert testimony Klein might have secured. In the context of this case, there is no possibility that Van Poyck could demonstrate that "but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger,* 654 So.2d 107, 109 (Fla.1995). In reaching this conclusion, we have taken into account the testimony offered by Dr. Robert T.M. Phillips. Dr. Phillips specifically opined that Van Poyck

> is an individual who has suffered from what we would describe as a psychoactive substance abuse, organic mental disorder, which is a long winded, perhaps unnecessary saying, this is someone who has suffered from the ravages of alcohol and drug dependency and at the height of their dependency is most dysfunctional.

Dr. Phillips also opined that Van Poyck suffered from a schizo- affective disorder, a disorder described as being "not quite schizophrenia." We restate that, when considered in the context of the entire record, an isolated advantageous evaluation cannot be considered determinative.

In light of our finding that Van Poyck cannot demonstrate prejudice, the supplementation of the record or the reopening of the evidentiary hearing would not have led to a finding of ineffective assistance of penalty-phase counsel. An error, if any, in refusing to reopen or to supplement is consequently harmless beyond a reasonable doubt.

Ineffective Assistance of Guilt-Phase Counsel

We next address Van Poyck's claim that he was denied effective assistance of counsel at the guilt phase of his trial. Specifically, Van Poyck claims that his guilt-phase representation was ineffective in the following ten ways: (1) by failing to demonstrate that Van Poyck was not the triggerman;

(2) by failing to impeach the testimony of Officer Turner; (3) by failing to present a voluntary intoxication defense; (4) by failing to pursue a motion to change venue; (5) by failing to adequately conduct voir dire; (6) by conceding the underlying felonies of robbery and escape; (7) by failing to preserve a *Batson*[10] violation; (8) by allowing a shift in the burden of proof; (9) by allowing Van Poyck to take a large role in trial preparations; and (10) by failing to object to prejudicial statements by the prosecutor. More generally, Van Poyck also complains that the court below erred in summarily denying certain claims, thereby denying him a full and fair hearing. We disagree. We affirm the trial court's denial of all relief on this issue. Prior to addressing any of the individual areas of concern as to guilt-phase representation, however, we point out the following insightful testimony offered by Van Poyck's trial co-counsel (Michael Dubiner, now a key Van Poyck witness) at the evidentiary hearing below:

> Q: You testified on direct that this was a loser in guilt phase. Is that still your opinion today?
>
> A [Dubiner]: No question about it.
>
> ....
>
> Q: There were numerous witnesses who identified the defendant as being involved in the escape attempt, isn't that correct?
>
> A: Yes.
>
> Q: The murder weapon was found in the vehicle where the defendant was eventually arrested with Valdes, correct?
>
> A: That's correct.

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[10] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Q: Officer Turner's weapon that was taken from him during the commission of this crime was found in that motor vehicle, correct?

A: That's correct.

Q: There's never an identity issue as to whether the defendant was involved in that escape attempt, identity was never in issue?

A: No.

Q: Would anything have changed the outcome of that guilt phase?
A: No. I think that the strong likelihood is that any defense that was presented in Phase I would have led to a first-degree murder conviction.

Surely this testimony from a defense witness militates towards a finding that Van Poyck could not have suffered prejudice under the second prong of *Strickland.* Dubiner's testimony is reinforced by the statements, on cross-examination, of another defense witness (at the evidentiary hearing below), Carey Haughwout. She stated:

Q: My question is very specifically to the guilt phase of that trial, is there a viable defense?

A: No, I don't believe that there is a defense that would have resulted in an acquittal, no.

Q: There is no voluntary intoxication defense?

A: Not that would have resulted in an acquittal, no.

Q: There is no insanity defense for the guilt phase?

A: Not that would have resulted in an acquittal.

Q: There's no defense of any kind to the guilt phase?

A: That's—I think that's what I said before, yes.

Our review of the record confirms the opinions expressed by both Dubiner and Haughwout. Even if trial counsel were, arguendo, deficient at the guilt phase, Van Poyck was not prejudiced by any of those mistakes. We stress, however, that we find few deficiencies. For instance, Klein clearly had tactical reasons for limiting his presentation of evidence that might indicate a triggerman other than Van Poyck. Klein testified at the evidentiary hearing below that he did not want to give up his "sandwich." In other words, he did not want to lose the opportunity of giving two closing arguments at the guilt phase. To that end, he stated the following:

Q: Was there—when you talked about the fact that it was important to save the sandwich, you're talking about the ability for the defense to argue first and last if there's no evidence offered aside from the testimony of the defendant?

A: Yes.

Q: Was that significantly important to you, sir?

A: It was. It was very important to both Mr. Dubiner and myself.

Q: Do you place an importance of argument over evidence?

A: Generally, no, I don't. But I thought in this case it was very important to have the opening salvo and the closing salvo.

Q: Was argument an important portion of Mr. Van Poyck's capital case for the defense?

A: Yes.

Q: How important?

A: Argument?

Q: Yes.

A: Since we didn't have any exculpatory evidence, I would say it was crucial.

We find it clear that Klein had sufficient tactical reasons for refraining from the presentation of further direct evidence (in the form of DNA tests and receipts from a gun shop) as to the triggerman's identity.

Van Poyck also alleges that Klein was deficient in his cross- examination of Officer Turner, the guard who survived the incident. As to that cross-examination, Klein testified at the evidentiary hearing as follows:

Q. Before going into that cross-examination, had you made some decision about how you were going to approach Mr. Turner?

A. I had many, many months to think about it, yes. I made a decision we were—that I was not going to flat out attack him but be somewhat sensitive in cross-examining Mr. Turner because I thought he would be very sympathetic to the jury.

Q. And it was a tactical decision, I take it, that you're describing?

A. Yes, I suppose you could put it that way. It was tactical. Him being the surviving guard in the incident, I thought the jury would have tremendous sympathy for him and I think probably would look askance on anybody directly attacking this guy. He was lucky to be alive, after all.

Despite these practical considerations, Klein still conducted a thorough cross-examination. His performance in this area was not deficient.

Next, Van Poyck argues that Klein was deficient in failing to investigate a voluntary intoxication defense. The record refutes any suggestion that Van Poyck was intoxicated at the time of the offense. Indeed, Van Poyck himself told Klein that he was sober. Further, Klein independently investigated the possibility that there was cocaine in the car used. He found no evidence of such substance. Klein was not deficient for rejecting this theory of defense.

In sum, Van Poyck was not denied effective assistance of counsel at the guilt phase. We can find few, if any, deficiencies in Klein's performance. More important, however, is that fact that Van Poyck can demonstrate no prejudice. Van Poyck has the heavy burden of demonstrating that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Our review of the record demonstrates that the result in the guilt phase of this case is certainly reliable. This is reinforced by the testimony, at the evidentiary hearing below, of two of Van Poyck's own witnesses. We affirm the holding of the court below on this issue.

Brady Claim

As his fifth[11] issue, Van Poyck claims that a note in the state attorney's file was withheld from him during discovery. He further claims that the note was both material and exculpatory. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The note at issue is not evidence. Instead, it is work-product. Even if it were evidence, though, it would not be material. In *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481, (1985)(Blackmun, J., plurality opinion), *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment), the United States Supreme Court forwarded the following formulation for determining materiality: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Applying such a materiality standard to the facts of this case, there is clearly no reasonable probability that the result would have been altered had the challenged note been disclosed. The contents of the challenged note indicated that the "wound [came] from the driver's side." This presumptively militated against a finding that Van Poyck was the triggerman. It would certainly have no effect on Van Poyck's conviction for felony murder. Therefore, the court below properly rejected this claim. We affirm the denial of relief.

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[11] Van Poyck's fourth issue concerning the great risk to many aggravating circumstance is procedurally barred and will, consequently, be addressed with other procedurally barred issues after we finish rejecting the claims that merit substantive review.

Remainder of Van Poyck's Claims

The remainder of Van Poyck's claims are as follows: (4) the great risk to many aggravating circumstance was unconstitutionally vague; (6) the judge and jury weighed the invalid aggravating factors that the murder was premeditated or that Van Poyck was the triggerman; (7) the prosecutorial argument as well as the jury instructions improperly shifted the burden of proof during the penalty phase proceedings; (8) the trial court improperly denied Van Poyck's challenges for cause during jury selection; (9) Van Poyck's constitutional rights were violated by the prosecutor's conduct during trial; (10) the acquittal and affidavit of O'Brien together with the testimony of Turner necessitate a new trial; (11) *Enmund /Tison*[12] errors necessitate a reversal of Van Poyck's death sentence; (12) the consideration, as an aggravating circumstance, of the underlying felony that had already been utilized to convict Van Poyck of felony murder was improper; (13) the trial court and prosecutor erred in indicating to the jury that sympathy was an inappropriate consideration; (14) the trial court failed to conduct an independent evaluation of the mitigation offered by Van Poyck; (15) the jury instructions given at the penalty phase were vague and confusing; and (16) the trial court committed fundamental error by failing to instruct the jury on justifiable or excusable homicide as part of the instruction on manslaughter.

All of these claims are procedurally barred. Most were raised and rejected on direct appeal.[13] One of these claims was not

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[12] *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

[13] Claims that were raised and resolved on direct appeal include (4), (6), (8), (10)(this material does not qualify as newly discovered evidence and the challenges to the convictions for attempted escape and premeditated murder were resolved in the direct appeal), (11), (12), (14), and (15). As to claim (4), we specifically stated in the direct appeal that "[w]e find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established

objected to at trial and fails to rise to the level of fundamental error.[14] Finally, two of the claims are waived because they should have been raised on direct appeal.[15]

For the reasons expressed, we affirm the lower court's denial of all relief.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

ANSTEAD, Judge, concurring in part and dissenting in part.

I dissent from that part of the opinion finding no error in the trial court's failure to consider the evidence of Dr. Villalobos, and in the majority's approval of the trial court's finding that trial counsel performed competently in investigating and preparing appellant's case for the penalty phase proceedings. This Court was faced with almost the identical circumstances in *Deaton v. Dugger,* 635 So.2d 4, 9 (Fla.1993), wherein we held that counsel who waited until after the guilt phase to prepare for the penalty phase and then "scrambled" to investigate and prepare mitigation "deprived

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in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause." *Van Poyck,* 564 So.2d at 1071. No subsequent change in the law is relevant to this analysis and therefore the procedural bar remains in place.

[14] Claim (9) is barred due to a lack of a contemporaneous objection at trial. Any error would not be fundamental.

[15] Claims (7) and (13) should have been raised on direct appeal.

[the defendant] of a reliable penalty phase proceeding." The same holding is mandated here.

The trial court ignored the issue of the failure to investigate and, instead, focused entirely on the apparently misrepresented statements of Dr. Villalobos, and the trial court's speculation that appellant's bad record would have resulted in a death recommendation regardless of any mitigation. Similarly, the majority here has ignored the undisputed evidence of lack of investigation and preparation, as well as this Court's own prior opinion which demonstrates counsel's utter failure to present any viable mitigating evidence to the trial judge and jury. See *Van Poyck v. State,* 564 So.2d 1066 (Fla.1990). The majority fails to acknowledge, for example, that even the meager mitigation evidence presented by counsel was not put together until after the penalty phase began, and even then counsel conceded he had to "scramble" to put anything on.[16] Further, the attempt at mitigation by this "scramble" actually backfired when the trial court not only rejected it, but used it to bolster the case against the defendant. *See* 564 So.2d at 1069.

The majority has simply rehashed a lot of general information known to trial counsel in an attempt to put the best face on a very bad situation. Tellingly, the majority has devoted some ten pages to a vain attempt to support a flawed analysis of less than two pages issued by the trial court.[17] *See* Majority op. at 688-695.

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[16] This "scramble" included the ill-fated attempt to use Dr. Villalobos, who, without time to do and review testing and secure background materials on the defendant, refused to get involved.

[17] The entire analysis and findings of the trial court are set out in less than two (2) pages that state:

> The great bulk of all the testimony received by the Court centers around counsel's alleged ineffective assistance during the penalty phase. Both trial co-counsel, Dubiner and Petitioner's expert, Haughwout, testified in great depth on this issue.
>
> Petitioner also presented the live expert testimony of Jan Vogelsang, a

The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases. Now, there are many resourceful and talented lawyers who, although lacking specific experience, would be able to learn the system and do an outstanding job of investigating and preparing a

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licensed clinical social worker, and Dr. Robert Phillips, a psychiatrist, along with the affidavits of two additional experts. Eight of the remaining nine live witnesses and most of the affiants were lay people, all of who [sic] testified to different aspects about the Petitioner's dysfunctional background. Each stated they could and would have testified during the penalty phase of the trial if called upon to do so.

The nexus of Petitioner's argument under this claim is primarily based upon the allegation that counsel failed to conduct a penalty phase investigation until the conclusion of the guilt-innocence phase; that what investigation was done was totally inadequate and ineffective and failed to present any in-depth mitigating mental health and background evidence. The sole witness presented by the State was Petitioner's trial co-counsel, Cary Klein. Despite Petitioner's evidence to the contrary, Klein investigated the possibility of mitigating mental health factors. In fact, he obtained the services of one Dr. Villalobos, a psychiatrist, who after interviewing the Petitioner prior to the penalty phase and reviewing psychological tests performed upon the Petitioner, told Klein that he, Dr. Villalobos, had nothing helpful to say about the Petitioner. Dr. Villalobos also told Klein that the Petitioner had told him that he, the Petitioner, had faked mental illness while in prison. Dr. Villalobos further informed Klein that the test results were unfavorable to Petitioner, that petitioner was a sociopath, and that he saw no evidence of organic brain syndrome. Armed with this information together with Petitioner's attempted escapes and long history of incarceration, Klein made a conscious, tactical judgment not to pursue this line of defense in the penalty phase of the trial for fear of opening a Pandora's box.

In view of the overwhelming evidence of guilt coupled with the Petitioner's extensive criminal and juvenile background, his admissions at the time of the trial, and in light of the 11 to 1 vote to impose the death penalty (which means a minimum of 5 jurors would have had to have voted differently), Petitioner has failed to carry the burden established by the United States Supreme Court in *Strickland*, i.e. the probability of a different trial outcome.

defense. However, in this case we have an inexperienced lawyer who has conceded that he was unprepared and, in his words "caught with [his] pants down," because he had erroneously assumed that the trial court would grant a lengthy continuance between the guilt phase and the penalty phase of the proceedings.

We do not have to guess at whether counsel did a proper investigation and prepared a defense *before* the penalty phase began: counsel admits he did not. Trial counsel acknowledged under oath that with the denial of a continuance he simply "ran out of time" to properly investigate mitigation. In addition, we have the sworn and unrebutted testimony of co-counsel who says the situation was so bad that he threatened to go to the trial judge and disclose the blatant lack of investigation and preparation. He concedes that he made a serious mistake in not doing so.

In the post-conviction hearing below the appellant presented a vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase. Two brief excerpts from appellant's brief provide a flavor of the information that would have been discovered had a proper investigation of appellant's life been done:

> Billy was sent to youth hall for the first time at age 12. Shortly after he arrived there, he was raped. Two years later, he was sent to the Florida School for Boys at Okeechobee. At Okeechobee, Billy was hog tied, drenched in water and left over night in the "wet room," and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. T. 486, 498; App. 32. He also saw other

children be sexually abused, and was placed under the supervision of older and larger offenders. T. 205-09. The substandard conditions at Okeechobee are well documented, *see generally* App. 37, and were described in detail by juvenile justice expert Paul DeMuro. DeMuro described the dangerous, overcrowded conditions in the dormitories, where status offenders were not separated from violent offenders, nor smaller children from larger, leading to frequent physical and sexual assaults on the younger and smaller children; the absence of any attempt to treat or rehabilitate youthful offenders; and the fact that small, middle class white boys without a history of institutionalization (like Billy Van Poyck when he was first sent to Okeechobee) were at the greatest risk. T. 319-32.

....

Approximately two years after Billy was sent to adult prison, he suffered a breakdown. For most of the next several years he received psychiatric treatment and medication, including "industrial strength" dosages of antipsychotic medications, and two admissions to the Florida State Hospital in Chattahoochee. T. 595-605; *see generally* Def. Exs. 23, 24. Dr. Rothenberg believes that this breakdown was the predictable result of the failure to provide the type of long term inpatient treatment he had recommended for Billy:

This subsequent history confirms my initial diagnosis. It is predictable and almost inevitable that a young and vulnerable person, already suffering from psychosis, would deteriorate further when placed in an adult prison, without any therapeutic intervention. In the absence of the type of therapeutic intervention that I recommended, there is no reason to believe that Mr. Van Poyck's mental illness has ever dissipated. While the observability of such a mental illness fluctuates over

> time and may be masked by medication, the mental illness itself persists.

App. 46.

> All of this mitigating evidence was readily available to trial counsel, but none of it was discovered or presented. The reasons for these failures are not far to seek. Mr. Van Poyck's lead attorney was Cary Klein. Klein was a general litigation attorney who had never before handled a capital case. T. 1041-42. From the beginning of this difficult, complex case Klein believed a felony murder conviction likely, and that the case would almost certainly go to a penalty phase proceeding. T. 1145. Also, at the very outset of the case Klein *discussed* potential mitigation with Mr. Van Poyck. T. 1060-61. However, Klein did not *investigate* for mitigation at any time prior to the trial. Instead, he had decided to wait until the guilt phase of the trial was over to begin penalty investigation because he believed that the trial court would give a one to three week continuance between phases. T. 1158. He explained at the hearing that he was counting on this time to "investigate" penalty phase issues and felt safe in doing so because the court had "assured" him that there would be a few weeks between phases. *Id.* As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. *See* T. 1196.

Appellant's Initial Brief at 15, 17-18.

In our previous review of this case we found insufficient evidence of premeditation but affirmed appellant's guilt on a felony-murder theory. In our opinion we upheld the sentence of death and expressly noted that the trial court properly rejected the meager mitigation offered by counsel. *Van Poyck v. State,*

564 So.2d 1066 (Fla.1990). Knowing what we do now, we should not give our approval to a sentence of death predicated upon a patent case of ineffective assistance of counsel. In doing so we are simply providing additional support to the already considerable body of evidence that the death penalty process is seriously flawed by the legal system's tolerance of incompetent counsel. *Cf.* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 Yale L.J. 1835 (1994). Van Poyck is not going anywhere; he has been convicted and imprisoned for first degree murder. His conviction and imprisonment are not in question. We should apply our holding in *Deaton v. Dugger* and remand this case for a reliable penalty phase proceeding in which evidence of aggravation and mitigation can be presented by counsel prepared on *both* sides.

KOGAN, C.J. and SHAW, J., concur.

694 So.2d 686, 22 Fla. L. Weekly S161

APPENDIX E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY.

CRIMINAL DIVISION "V"

CASE NO.: 87-0736-CF A02
88-11116-CF A02

STATE OF FLORIDA

VS.

WILLIAM VAN POYCK,

Defendant.

ORDER

THIS MATTER is before the Court for Sentencing. The Court notes that the order will contain sentencing for each court and that the sentencing order will state the counts in the same order of the verdict form, not the order of the indictment.

COURT I: The jury having found the Defendant, WILLIAM VAN POYCK guilty of First Degree Murder and having by a vote of eleven to one made a recommendation of death it is the judgment and sentence of the Court that WILLIAM VAN POYCK be sentenced to death for the murder of FRED GRIFFIS. Said sentence is to be carried out in accordance with the laws of the State of Florida.

The Court finds as aggravating circumstances the following:

1. The crime for which WILLIAM VAN POYCK is sentenced to death was committed while he was under a sentence of imprisonment in that he was on parole at the time of commission of this act.

2. The crime for which the Defendant is sentenced was committed for purpose of effecting an escape from custody and in this case to effect the escape of Mr. O'Brien.

3. The Defendant in the commission of this crime for which he is sentenced knowingly created a great risk of death to many persons; this includes the people at the scene of the murder to wit: Officer Steven Turner, Mr. Ruble and Mr. Zimmerman who work at Good Samaritan Hospital and upon hearing the shots went to check the matter out and saw Mr. Van Poyck point a firearm at them. After the incident a bullet hole was found in the nurses' residence next to the doctor's office where the murder occurred, in the direction and area Mr. Van Poyck had pointed the firearm at Mr. Ruble and Zimmerman. Further, Mr. & Mrs. Brown in the Cadillac that pulled up into the alley as the events occurred; the individuals in the doctor's office including but not limited to: Mrs. Oriole, Dr. Rosenberg, and Lisa Bancraft, who were looking out the windows and door, along with another witness, Heff who was standing in the alley watching all the events.

This Court believes that the chase that took place in Mr. Van Poyck and Mr. Valdes' attempt to escape from the scene where numerous police cars were fired at, approximately twenty shots total, on two of the busiest streets in Palm Beach County, (Palm Beach Lakes Blvd. & Australian Blvd.) Is a part of this aggravating factor of knowingly creating a great risk of death to many persons, (see the convictions for counts 0 through 11).

4. The Defendant, WILLIAM VAN POYCK having previously been convicted of another capitol offense or felony involving the use of threat or violence to some person, in this case the prior conviction of the offense of robbery, which involved a shooting and chase.

Further this Court does not find that any mitigating factors exist or have been shown to exist. The defendant presented evidence which attempted to show that he was under the influence of another person to wit; his brother and or Mr. O'Brien. This Court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further the Defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The only other potential mitigating circumstance for which evidence was presented was that the Defendant, WILLIAM VAN POYCK's mother died when he was approximately eighteen (18) months of age. However it was shown that he was subsequently raised in a good family and by people that cared for him. Further the Court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdes to assist him and who checked the guns on the way to the location where the murder occurred to see to it that they were loaded. By all evidence Mr. Van Poyck was a major participate in this murder.

The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-mediated murder

and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

COUNT II: This Court for the sentence of armed robbery with a firearm sentences the Defendant, WILLIAM VAN POYCK to a term of LIFE in the State Department of Corrections with a three year mandatory minimum sentence to run consecutive with any sentence prior imposed.

COUNT VI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense or attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VIII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of the charge of attempted manslaughter, said sentence to run consecutive to any sentence prior imposed.

COUNT IX: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, this sentence to run consecutive to any prior imposed.

COUNT X: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of

attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XII. This Court sentences the Defendant, WILLIAM VAN POYCK to __5__ years with a minimum mandatory sentence of 3 (three) years for the conviction of aggravated assault said sentence shall run consecutive to any prior imposed.

COUNT XIV. This court sentences Defendant, WILLIAM VAN POYCK to __15__ years for the conviction of aiding in the attempted escape said sentence to run consecutive to any prior imposed.

For the conviction contained in information 88-11116-CF A02 this Court on the charge of Attempted First Degree Murder, this court sentences the Defendant to __LIFE__ In prison to run consecutive to any prior imposed, with a 3 year mandatory minimum. This mandatory minimum 3 year sentence shall run concurrent with the mandatory minimum sentence contained in count two.

DATE AND ORDERED this ____ day of _____, 198__, in West Palm Beach, Palm Beach County, Florida.

_____
MICHAEL D. MILLER
CIRCUIT COURT JUDGE

APPENDIX F

Jury Verdict Form Excerpts

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
CRIMINAL DIVISION, IN AND FOR
PALM BEACH COUNTY FLORIDA

INDICTMENT NO: 87-6736CF A02

VERDICT

STATE OF FLORIDA)
)
)
VS.)
)
WILLIAM VAN POYCK)

AS TO EACH COUNT, CHECK ONLY ONE

COUNT ONE

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guily of FIRST DEGREE MURDER of Officer Fred Griffis, as charged in the Indictment.

We, the jury, also find that the Murder was:

a. First Degree Premeditated Murder ____
b. First Degree Felony Murder __X__
c. Both, First Degree Premeditated Murder and First Degree Felony Murder __X__

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of SECOND DEGREE MURDER of Officer Fred Griffis, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of THIRD DEGREE FELONY MURDER of Officer Fred Griffis, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of MANSLAUGHTER of Officer Fred Griffis, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm X
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TWO

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ARMED ROBBERY WITH A FIREARM of Officer Steve Turner, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ROBBERY WITHOUT A FIREARM of Officer Steve Turner, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of GRAND THEFT of Officer Steve Turner, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty,

COUNT SIX

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Richard Hines, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Richard Hines, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Richard Hines, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Richard Hines, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT SEVEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Freddie Naranjo, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Freddie Naranjo, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Freddie Naranjo, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Freddie Naranjo, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm	__X__
b. without a firearm	____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT EIGHT

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Geoffery Woodward, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Geoffery Woodward, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Geoffery Woodward, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Geoffery Woodward, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT NINE

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Dale Fell, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Dale Fell, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Dale Fell, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Dale Fell, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm ____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Robert Provost, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Robert Provost, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Robert Provost, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Robert Provost, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm ___X___
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT ELEVEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer John Woods, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer John Woods, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer John Woods, as contained in the Indictment,

___X___ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer John Woods, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm ___X___
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TWELVE

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of AGGRAVATED ASSAULT of Fred Brown, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED AGGRAVATED ASSAULT of Fred Brown, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ASSAULT of Fred Brown, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT FOURTEEN

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of AIDING IN THE ATTEMPTED ESCAPE of James O'Brien, as charged in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm: _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

INFORMATION NO. 88-11116-CF A02

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Steven Turner, as charged in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Steven Turner, as contained in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Steven Turner, as contained in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Steven Turner, as contained in the Information,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

So say we all.

_____, 19__. _____
West Palm Beach, Florida.

APPENDIX G

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

EIGHTH AMENDMENT: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty and property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTE SECTION 925.11. Postsentencing DNA testing

(1) Petition for examination.- -

(a) A person who has been tried and found guilty of committing a crime and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced which may contain DNA (deoxyribonucleic acid) and which would exonerate that person or

mitigate the sentence that person received.

(b) Except as provided in subparagraphs 2., a petition for postsentencing DNA testing may be filed or considered:

1. Within 4 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 4 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 4 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2005, whichever occurs later; or

2. At any time if the facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.

(2) Method for seeking postsentencing DNA testing.- -

(a) The petition for postsentencing DNA testing must be made under oath by the

sentenced defendant and must include the following:

1. A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained;

2. A statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result;

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime;

4. A statement that identification of the defendant is a genuinely

disputed issue in the case, and why it is an issue;

5. Any other facts relevant to the petition; and

6. A certificate that a copy of the petition has been served on the prosecuting authority.

(b) Upon receiving the petition, the clerk of the court shall file it and deliver the court file to the assigned judge.

(c) The court shall review the petition and deny it if it is insufficient. If the petition is sufficient, the prosecuting authority shall be ordered to respond to the petition within 30 days.

(d) Upon receiving the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the petition or set the petition for hearing.

(e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency.

(f) The court shall make the following findings when ruling on the petition:

1. Whether the sentenced defendant has shown that the physical evidence that may contain DNA still exists;

2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(g) If the court orders DNA testing of the physical evidence, the cost of such testing may be assessed against the sentenced defendant unless he or she is indigent. If the sentenced defendant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(h) Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in s. 943.3251.

(i) The results of the DNA testing ordered by the court shall be provided to the court, the sentenced defendant, and the prosecuting authority.

(3) Right to appeal; rehearing.--

(a) An appeal form the court's order on the petition for postsentencing DNA testing may be taken by any adversely affected party.

(b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered.

(c) The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(d) The clerk of court shall serve on all parties a copy of any order rendered with a certificate of service, including the date of service.

(4) Preservation of evidence.--

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to,

any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) Except for a case in which the death penalty is imposed, the evidence shall be maintained for at least the period of time set forth in subparagraph (1)(b)1. In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence.

(c) A governmental entity may dispose of the physical evidence before the expiration of the period of time set forth in paragraph (1)(b) if all of the conditions set forth below are met.

1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.

2. The notifying entity does not receive, within 90 days after sending the notification, either

a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.

3. No other provision of law or rule requires that the physical evidence be preserved or retained.

FLORIDA RULE OF CRIMINAL PROCEDURE 3.853. Motion for Postconviction DNA Testing

(a) Purpose. This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under section 925.11, Florida Statutes.

(b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous

DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) Procedure.

(1) On receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is insufficient. If the

motion is sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) On receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and on making the appropriate finding of indigence.

(5) The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that physical evidence that may contain DNA still exists.

(B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

(C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

(d) Time Limitations.

(1) The motion for postconviction DNA testing must be filed:

(A) Within 4 years following the date that the judgment and sentence in the case became final if no direct appeal was taken; within 4 years following the date the conviction was affirmed on direct appeal if an appeal was taken; within 4 years following the date collateral counsel was appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case in which the death penalty was imposed; or by October 1, 2005, whichever occurs later; or

(B) At any time, if the facts on which the petition is predicated were unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence.

(2) A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under rule 3.851, which is based solely on the results of the court-ordered DNA

testing obtained under this rule, shall be treated as raising a claim of newly-discovered evidence and the time periods set forth in rules 3.850 and 3.851 shall commence on the date that the written test results are provided to the court, the movant, and the prosecuting authority pursuant to subsection (c) (8).

(e) Rehearing. The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(f) Appeal. An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.

APPENDIX H

**IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA**

THE STATE OF FLORIDA	
v.	Case Nos.: 87-6736-CF-A02
WILLIAM VAN POYCK	88-11116-CF-A02

MOTION FOR POST CONVICTION DNA TESTING

...

18. The threshold standard for whether DNA evidence will exonerate the defendant or mitigate his sentence is whether there is a "reasonable probability" of exoneration or mitigation had the evidence been admitted. *Knighten v. State*, 829 So.2d 249 (Fla. 2d DCA 2002). That threshold standard is met here. It is well established, under controlling case law decisions from the Supreme Court of Florida and the United States Supreme Court, that the fact that a capital defendant was not the actual killer is a powerful and recognized non-statutory mitigating circumstance which a defendant has a right to present and which his jury and judge must consider. *See, e.g., Barrett v. State*, 649 So. 2d 219 (Fla. 1994) (stating that "conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment.");

Cooper v. State, 649 So. 2d 219 (Fla. 1991) (conflicting evidence regarding identity of triggerman is valid grounds for a recommendation of life imprisonment); *see also Downs v. State*, 572 So.2d 895 (1191) (trial court erred in excluding evidence and testimony at sentencing hearing that would have supported defendant's claim that he was not the triggerman); *Zerquera v. State*, 549 So.2d 189 (Fla. 1989) (trial court in guilt phase erred by suppressing evidence that could have cast doubt on State's allegation that defendant was the triggerman); *Harmon v. State*, 527 So. 2d 182 (Fla. 1988); *DuBoise v. State*, 520 So. 2d 260 (Fla. 1988). These cases are consistent with federal cases on point. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (capital sentence must consider *all* mitigating evidence presented); *Eddings v. Oklahoma*, 455 U.S. 104 (1982P (same); *Lockett v. Ohio*, 438 U.S. 586 (1978) (capital sentence cannot be precluded from considering valid mitigating evidence).

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APPENDIX I

**IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NOS.:
87-6736 CF A02
88-11116 CF AO2

WILLIAM VAN POYCK,

Defendant.

MOTION FOR REHEARING

...

10. Second, the State is off the mark when it argues about what effect DNA testing might have on a reviewing court. Instead, the sole relevant inquiry is what impact would the newly discovered evidence have had *on the jury* if the jury had heard the evidence in the first instance? The wisdom of this jury-oriented inquiry has been borne out by the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

11. Further, this Court should note that the contexts in which Van Poyck has argued that he was not the triggerman differ considerably from the present context. For example, Van Poyck raised a *Brady v. Maryland* claim when post-conviction counsel

discovered an exculpatory memorandum and diagram, authored by the medical examiner, which the State had hidden in its files—which indicated that Valdes had to have been the triggerman. The Florida Supreme Court reviewed that claim as it bore on Van Poyck's conviction, not his sentence. *See, Van Poyck v. State*, 694 So. 2d 686, 698 (1997). Likewise, Van Poyck argued that he was not the triggerman in the context of an Eight Amendment *Enmund/Tison* claim. *See Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). However, the analytical and constitutional framework underlying an *Enmund/Tison* claim is totally different and distinct from the legal issue at bar here. The same is true where Van Poyck presented the issue of his not being the triggerman within the context of an ineffective assistance of counsel claim.

12. Finally, there have been any number of Supreme Court decisions that have undermined the portions of Van Poyck's unsuccessful appeals that the State now points to and relies on for the proposition that Van Poyck has brought this claim before and has failed. For example, following *Espinosa v. Florida*, 505 U.S. 1079 (1992), and *Sochor v. Florida*, 504 U.S. 527 (1992); and *Stringer v. Black*, 503 U.S. 222 (1992), it is unquestioned that it is constitutional error for a capital jury to consider improper or invalid aggravating circumstance (which is precisely how Van Poyck characterized his claim his judge and jury erroneously considered and relied upon the now repudiated "fact" that Van Poyck was the triggerman). Such a "jury taint" cannot be considered harmless error. Subsequent Florida Supreme Court decisions have affirmed this constitutional principle. *See, e.g., Banks v. State*, 700

So. 2d 363 (Fla. 1997) at 366 and 369; *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994).

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APPENDIX J

IN THE SUPREME COURT OF FLORIDA

William Van Poyck,

Appellant,

vs.

Case No. SC04-696
Circuit Court Case Nos.:
87-6736CF
88-11116CF A02

CAPITAL CASE

State of Florida,

Appellee.

INITIAL BRIEF OF APPELLANT

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I. ARGUMENT

The Lower Court Erred As A Matter Of Florida Law, And Under The Eighth And Fourteenth Amendments To The Constitution In Summarily Denying Mr. Van Poyck's Motion For Postconviction DNA Testing On The Grounds That There Is No Reasonable Probability That DNA Evidence Proving That Van Poyck Was Not The Triggerman Will Result In A Different Sentence.

1. Controlling Law and Standard of Review

Section 925.11, Fla. Stat., which was adopted in 2001, extended to convicted criminal defendants the substantive right to obtain DNA testing in order to challenge their conviction or sentence. The statute was prompted by the well-publicized case of Frank Lee Smith, who was shown through DNA testing to be actually innocent shortly after his death in early 2000 from cancer, after having spent years on death row, with the State having fought DNA testing at every turn during this time.

When this Court issued Fla. R. Crim P. 3.853, it established the court procedure to be employed when exercising that substantive right. *Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001). Rule 3.853 sets forth the pleading requirements to be used by a convicted defendant to obtain DNA testing of biological evidence. "[T]he purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may

resolve the issue.'" *Zollman v. State*, 820 So.2d 1059, 1062 (Fla. 2nd DCA 2002, quoting *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d at 636 (Anstead, J., concurring).

The manner in which this right is implemented has constitutional dimensions. Where the State of Florida extends a right or a liberty interest, the right or liberty interest may only be extinguished in a manner that comports with due process. This was explained by the United States Supreme Court in *Evitts v. Lucey*, 469 U.S. 387 (1985). There, the Court noted that the States were not required to provide a right to a direct appeal of a criminal conviction. However, where the right was nonetheless extended, due process protection attached:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may chose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause.

Evitts, 469 U.S. at 400-01.[4]

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[4] Similarly in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the United States Supreme Court found due process protection accompanied the extension of the right to seek clemency. In delivering the controlling plurality opinion for the Court, Justice O'Connor, along with three other justices concluded that, "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." *Id.* at 288 (O'Connor, J., concurring in part and concurring in judgment). In finding that due process attached to the right to seek clemency, Justice O'Connor referenced her concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986). There, Justice O'Connor had found that " '[l]iberty interest protected by the Fourteenth Amendment may arise from two sources – the Due Process

Having extended to Mr. Van Poyck a right to obtain DNA testing of the physical evidence in his case, the State of Florida can only extinguish that right in a manner that comports with due process. To allow Mr. Van Poyck to be summarily denied DNA testing of the available physical evidence that would act as powerful mitigation to his sentence, would demonstrate an arbitrary process in violation of the Eighth and Fourteenth Amendments. This Court *sua sponte* ordered DNA testing in the case of *Duckett v. State*, Case No. SC01-2149 (Order dated 3/21/03), at the request of the Appellant relinquished jurisdiction to permit DNA testing in *Rivera v. State*, Case No. SC01-2523 (Order dated 7/11/02), and recently ordered testing in *Swafford v. State*, Case No. SC03-931. (Order dated 3/26/04)

2. The "Reasonable Probability" Standard.

Rule 3.853 provides that a motion for DNA testing requires only that there be "a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence has been admitted at trial." Thus, a motion for DNA testing should be granted "if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial." *Knighten v. State*, 829 So.2d 249, 252 (Fla 2nd DCA 2002). In making this determination, the allegations contained in the motion must be taken as true. *Borland v. State*, 848 So.2d

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Clause and the laws of the State.'" 477 U.S. 399, 428 (O'Connor, J., concurring in part, dissenting in part) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). Justice O'Connor explained, "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." *Ford*, 377 U.S. at 428-429.

1288, 1290 (Fla. 2003) ("If the State's response creates a factual dispute, the trial court should conduct an evidentiary hearing to resolve the dispute.")

The "reasonable probability" standard is a familiar legal standard first adopted and explained by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The next year, the Supreme Court used that standard for determining whether undisclosed exculpatory evidence was material. *United States v. Bagley*, 473 U.S. 667 (1985). As this Court has explained, exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. *Garcia v. State*, 622 So.2d 1325, 1330-31 (Fla. 1993). Under this standard, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 419, 434 (1995).[5]

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[5] Under this standard, it is not a question of whether there was sufficient evidence to convict. In *Kyles*, the U.S. Supreme Court explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

514 U.S. at 453. Thus, for example, the fact that an eyewitness identified the defendant at trial is no bar to obtaining DNA testing under

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Rule 3.853. *Manual v. State*, 28 Fla. L. Weekly D1399 (Fla. 2nd DCA June 13, 2003); *Knighten v. State*, 829 So.2d 249, 251 (Fla. 2nd DCA 2002). With favorable DNA results, the eyewitness "testimony may not have been sufficient to convict." *Riley v. State*, 28 Fla. L. Weekly D1790 (Fla. 2nd DCA July 30, 2003. Given that assumption, it simply cannot be said that the verdict in this case – or more precisely, since this is a mitigation case, the sentence – is "worthy of confidence".

APPENDIX K

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,	)	
	)	
Appellant	)	
	)	Case No. SC04-696
vs.	)	Circuit Court Case Nos.:
	)	87-6736CF
STATE OF FLORIDA,	)	99-11116CF A02
	)	
Appellee	)	

REPLY BRIEF OF APPELLANT

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THE LOWER COURT ERRED AS A MATTER OF FLORIDA LAW AND UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IN SUMMARILY DENYING VAN POYCK'S MOTION FOR POST-CONVICTION DNA TESTING

...

II. ARGUMENT

A. The Prior Proceedings: No Court Has Ever Found That Conclusive Evidence Absolving Van Poyck of Being the Triggerman Would Not Have Affected His Sentence.

The State expends much of its answer brief in describing how this Court, in 1990, rejected Van Poyck's *Tison v. Arizona* proportionality claim,[1] and affirmed Van Poyck's death sentence. It is that *Tison* claim which the State repeatedly refers to as "the triggerman issue" in its attempt to convince this Court that the "triggerman issue" has already been litigated. But the resolution of Van Poyck's 1990 *Tison* claim is irrelevant to the issue now before this Court.[2] The issue

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[1] *Tison v. Arizona*, 481 U.S. 137 (1987).

[2] *Tison v. Arizona* is not a general, catch-all "triggerman issue," as the state apparently believes. A *Tison* claim is a distinct Eighth Amendment issue dealing with the constitutional propriety of a death sentence for a non-triggerman, and it involves a unique two-part analysis. A *Tison* claim is a "threshold issue" concerning whether such a defendant is even eligible for a death sentence under the Eighth Amendment and "society's evolving standards of decency." That obviously is a far cry from the newly discovered evidence standard that governs this motion, i.e., whether there is a reasonable probability that the sentence would be different.

currently before this Court is not a *Tison* claim and this Court's prior 1990 disposition of Van Poyck's *Tison* claim is immaterial to the entirely separate claim now before this Court. Whether Van Poyck was a "major participant" in the underlying felony, while germane to the issue of whether Van Poyck's sentence "was constitutionally permissible" (State Br. p. 13), is irrelevant to the issue on this appeal: whether it is reasonable to infer that DNA evidence showing that Van Poyck was not the triggerman would have resulted in a different sentence at trial.

...

While ignored by the State, this one central fact is inescapable: Van Poyck was sentenced to death by a jury and judge who believed that he was, or was most likely, the person who shot and killed the victim. Contrary to the State's suggestion, we do not have to speculate about this or resort to what points the State "emphasized" in its arguments to the jury. Rather, we only need to look at the *jury verdict form*, in which the jury checked the box labeled "both first-degree premeditated murder and first-degree felony murder," and the *sentencing order* in which the trial judge expressed the view that Van Poyck was "the individual who pulled the trigger and shot Fred Griffis." R.4138 and 4199, attached as the Appendix of Initial Brief of Appellant. Given this documentation in the record of the fact-finder's belief that Van Poyck was indeed the triggerman, it is impossible to conclude that there is no "reasonable probability" that the sentence would have been different had the true facts, which DNA evidence will establish, been known.[3]

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[3] Even in the absence of the verdict form and sentencing order Van Poyck's sentence can be linked to the belief that he was the triggerman. It is most likely that the premeditated murder findings made by the jury and the trial judge came as a result of the State's arguments at trial, becoming an aggravating circumstance – certainly this issue was eliminated as a mitigating circumstance. Accord, *Sochor v. Florida*, 504 U.S. 527 (1992), and *Espinosa v. Florida*, 505 U.S. 1079 (1992) (In a weighing state like Florida, Eighth Amendment error occurs when the sentencer – either the jury or the judge – weighs an invalid aggravating factor in reaching the decision to impose a

C. The Nature of this Motion: There Is a Reasonable Probability that DNA Testing Could Result in a Sentence Other than Death.

The statute and implementing rule underlying this appeal, Rule 3.853, provides that for a motion for DNA testing to succeed there need only be "a reasonable probability that the movant would have been acquitted or *would have received a lesser sentence* if the DNA evidence had been admitted at trial." (emphasis added) It is impossible to see how such a reasonable probability could not exist in this case. Even the State concedes "the general proposition that 'non-triggerman status' is mitigating evidence" (page 8 of the State's answer brief).

By statute, and under this Court's long-standing precedent governing newly discovered evidence cases, the significance of the newly discovered evidence must be viewed and weighed by its likely effect on a jury, and cannot simply be re-weighed by a reviewing court. *See, State v. Mills*, 788 So. 2d 249 (Fla. 2001). Accordingly, again contrary to the State's claim, this Court's *Tison* ruling in 1990 is not relevant to the present appeal. When Florida Legislature adopted Section 925.11, Florida Statutes (2001), and when this Court issued Rule 3.853, the State of Florida extended to all convicted criminal defendants a new, substantive right – a right to use

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death sentence). *See also, Stringer v. Black*, 503 U.S. 222 (1992), where the Supreme Court addressed the role of a reviewing court when the sentencing body has weighed an invalid factor in its decision to impose a death sentence:

> [A] reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Id., at 232, 112 S. Ct. at 1137.

DNA evidence to either exonerate them if wrongfully convicted or to show that there would have been a "lesser sentence."

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...

The reasonable probability standard is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). It is inherently subjective, requiring the Court to view the evidence through the eyes of a jury. In making this evaluation, a number of concluding points bear emphasis.

First, with exonerating DNA evidence in hand, Van Poyck would be a non-triggerman convicted of an unpremeditated murder. Van Poyck did not kill anyone nor did he intend that anyone should die. In contrast, at his original trial, not only was his believed triggerman status a likely *de facto* aggravating factor, given the jury and trial judge findings, but Van Poyck was also deprived of a significant mitigating factor, as even the State concedes. State Ans. Brief p. 8.

Second, there now exists a wealth of substantial mitigating evidence, unearthed during post-conviction proceedings, which was not known to Van Poyck's jury and judge, nor to this Court on direct appeal. This mitigating evidence is set forth in *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997), and formed the basis for this Court's 4-3 split decision in that case. The existence of this mitigating evidence should be taken into consideration in deciding whether a new penalty phase jury, now also armed with the knowledge that Van Poyck did not kill anyone, would recommend a different sentence.

Third, notably absent from this case are Florida's two most egregious aggravating factors, to wit, heinous, atrocious or cruel, and cold, calculated and premeditated. In numerous other cases where this Court has vacated death sentences this Court has made a specific point of observing the absence of these

aggravators (notwithstanding the fact that in all of those cases the defendant was the actual killer). *See, e.g., Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999), where this Court reduced the death sentence to life imprisonment despite the fact that the defendant shot and killed the store clerk during the robbery ("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it isn ot without some relevance to a proportionality analysis.") In *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), the defendant had shot and killed a police officer while holding several people hostage. Despite the existence of five aggravating factors, this Court vacated the death sentence on proportionality grounds. In doing so this Court observed that, "[i]n contrast, [to the mitigating evidence] the aggravating circumstances of heinous, atrocious and cruel, and cold calculated and premeditated are conspicuously absent." *Id.*, at 812. *See also, Duest v. State*, 855 So. 2d 33, 54 ("Additionally, we have repeatedly stated that HAC is one of the most serious aggravating circumstances set out in Florida's sentencing scheme.")

Finally, in judging how a jury might weigh the fact that Van Poyck did not kill the victim, it should be reiterated that, "[i]n Florida, we have repeatedly stated that the ultimate punishment of death is reserved for the most aggravated and indefensible of crimes committed by the most culpable of offenders." *Brennan v. State*, 754 So. 2d 1, 10 (Fla. 1999). *See also, DeAngelo v. State*, 626 So. 2d 440, 443 (Fla. 1993). ("This court has repeatedly noted that the death penalty is reserved for the most aggravated and unmitigated of crimes."); *Larkins, supra,* at 93 ("As we have stated time and again, death is a unique punishment [citations omitted]. Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders.")

Against this backdrop Van Poyck submits that there exits most than "a reasonable probability" that a penalty phase jury, upon learning that Van Poyck did not kill anyone, would recommend life imprisonment over death. With this question answered in the affirmative the order under appeal must be reversed.

APPENDIX L

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,	)	
	)	
Appellant	)	
	)	Case No. SC04-696
vs.	)	Circuit Court Case No.:
	)	87-6736CF
STATE OF FLORIDA,	)	88-11116CF A02
	)	
Appellee	)	

APPELLANT'S MOTION FOR REHEARING AND/OR CLARIFICATION

...

PRELIMINARY STATEMENT

Preliminarily, the legal basis for this Court's ultimate conclusion that there exists no reasonable probability that Van Poyck would have received a different sentence had his jury and judge known that Van Poyck was not the triggerman is unclear. This Court's denial of relief appears to rest on two alternative holdings: 1) Van Poyck's status as a non-triggerman is irrelevant because this Court, in Van Poyck's 1990 direct appeal decision, upheld his death sentence pursuant to *Tison v. Arizona*, 481 U.S. 137 (1987); or, 2) Van Poyck's jury and judge may, in fact, have sentenced him to death based on factors having nothing to do with whether he was or was not the triggerman and this alternative basis for the sentence cannot now be questioned. In either event, the Decision misapprehends or overlooks these substantial legal and factual matters:

ARGUMENT

1. At the outset of its legal analysis the majority correctly frames the dispositive issue before this Court:

> The issue before the Court is whether DNA evidence establishing that Van Poyck was not the triggerman creates a reasonable probability that Van Poyck would have received a lesser sentence.

Dec'n p. 6.

However, after initially correctly stating the issue this Court went on to deny Van Poyck relief based upon a finding that this Court had already, in Van Poyck's 1990 direct appeal decision, upheld the death sentence on proportionality grounds under the felony murder analysis mandated by *Tison v. Arizona, supra*. Dec'n pp. 8-9. The majority reasoned that:

> Evidence establishing that Van Poyck was not the triggerman would not change the fact that he played a major role in the felony murder and that he acted with reckless indifference to human life.

Dec'n p. 9.

The Court went on to state that in its 1990 decision it had observed that "the death penalty is appropriate . . . if the defendant is a major participant in the felony and acted with reckless indifference to human life." Dec'n p. 9.

This analysis mixes apples and oranges. Indeed, this Court did not in its 1990 decision, rule that the death penalty was "appropriate" in such circumstances; only that it was not disproportional if it was imposed. The issue now before this Court is not a *Tison* claim; it is not whether Van Poyck was "death eligible," but whether there exists "a reasonable probability" that a jury and a judge would have imposed a death sentence when provided affirmative proof that he was not the triggerman. No court has ever said it would make no difference, because that cannot be said under any reasoned analysis. The distinction here is absolutely crucial. The dispositive issue is not, as the Decision suggests, whether it is constitutionally permissible to impose and/or affirm a death sentence imposed upon a nontriggerman (i.e., a Tison claim); rather, the only dispositive issue is whether there is "a reasonable probability" that a jury would have recommended, and a judge would have imposed a death sentence upon Van Poyck had they known that Van Poyck was not the triggerman. As such, this Court's prior 1990 Tison analysis is totally irrelevant to the only issue at bar.

This fundamental misapprehension by the majority as to the true nature of the issue at bar – that Van Poyck was deprived of substantial mitigation – constitutes an arbitrary and capricious basis for denial of this claim, resulting in a denial of Van Poyck's due process rights. As pointed out on pages 15-17 of Van Poyck's initial brief, when the Florida Legislature adopted Section 925.11, Fla. Stat., in 2001, and when this Court promulgated Rule 3.853, Fla.R.Crim.Proc., which implemented § 925.11, Fla. Stat., it afforded Van Poyck, and all other prisoners, a vested due process right to obtain DNA testing in appropriate cases.

Accordingly, under established principles of due process Van Poyck possesses a constitutional right to the disposition of the merits of his claim in a manner consistent with due process. In other words, this claim cannot be denied upon arbitrary and capricious grounds which are irrelevant to

the issue before the Court. Accordingly, Van Poyck moves this Court to re-examine this issue without reference to this Court's prior 1990 Tison analysis. Alternatively, Van Poyck moves this Court to clarify the Decision to more clearly explain how this Court's 1990 Tison analysis is relevant to the disposition of this claim.

2. To the extent that this Court's decision rests upon the theory that because the jury and judge may have based their death recommendation and sentence upon the alternative ground "that Van Poyck played a major role in the felony murder and that he acted with reckless indifference to human life," and that, "Therefore, the State's theory that the death penalty was appropriate was not based primarily on Van Poyck's triggerman status" (Dec'n pp. 6-7), the Decision overlooks and misapprehends several salient legal and factual points. First, it is pure speculation to say that the jury and judge would have ruled the same way had they known the truth that he was not the triggerman. This error is particularly egregious when one considers that what the jury found is memorialized in the verdict form. See pages 8-9 and 22-23 of Van Poyck's initial brief. That verdict form, which shows that as many as 11 jurors believed he was the triggerman, eliminates any need to speculate about what the jury believed. There exists absolutely no evidentiary basis for the majority to conclude that it made no difference to the jury whether Van Poyck was the triggerman or not – just the opposite is true, since we do not have to speculate at all whether the jury believed he was the triggerman. From the verdict form, we *know* that the jury believed he was the triggerman.

Second, by upholding Van Poyck's death sentence based upon this speculative "alternative ground," which this Court now, for the first time, states that the jury may have relied upon, the Court implicates well-established Eighth and Fourteenth Amendment principles which hold that a "general verdict" that is based upon two or more alternative grounds must be set aside where one of those grounds is determined to

be legally insufficient, because that verdict may have rested exclusively on that insufficient ground. Accord, *Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957); *Zant v. Stephens*, 462 U.S. 862 (1983); *Mills v. Maryland*, 486 U.s. 367 (1988); *Griffin v. United States*, 502 U.S. 46 (1991). This Court, in Van Poyck's 1990 direct appeal, set aside as legally insufficient the jury's verdict of first-degree premeditated murder, and any finding that Van Poyck was the triggerman. *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990), at 1069-70. Now, in the Decision, this Court speculates that the jury's death recommendation and the judge's death sentence may have been based upon an alternative (and legally sufficient) finding "that Van Poyck played a major role in the felony murder and that he acted with reckless indifference to human life." Stromberg, Zant and progeny do not permit such unfounded speculation. *See also, Sochor v. Florida*, 504 U.S. 529 (1992), which extended the rule of *Griffin, supra*, from general verdicts, where one of several theories is unsupported, to jury sentencing considerations, where one of several jury sentencing basis is unsupported.

3. Also overlooked and misapprehended is how the Decision runs afoul of well-established Eighth Amendment principles regarding the reliability of capital sentences. The United States Supreme Court has handed down a trio of capital case decisions emphasizing the constitutional necessity of ensuring the reliability of death sentences in the context of weighing mitigating and aggravating circumstances. *Stringer v. Black*, 503 U.S. 1079 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992); and *Espinosa v. Florida*, 505 U.S. 1079 (1992). These cases hold that in "weighing states," such as Florida, the jury is a "sentencer" and that any constitutional error that infects the jury's consideration and weighing of aggravating and mitigating circumstances taints the jury's recommendation. This taint, in turn, carries over to and is necessarily incorporated into the sentencing judge's actual sentence of death because, under Florida law, the judge must give "great weight" to the jury

recommendation. It is difficult to imagine a greater "taint" than an erroneous conviction of first-degree premeditated murder and an erroneous finding that Van Poyck was the triggerman which, in turn, deprived Van Poyck of the ability to present, as mitigating evidence, that Van Poyck did not kill the victim. The Decision, by saying "it does not matter" who the killer is, and that it "would not matter" if Van Poyck could affirmatively show he was not the triggerman, now puts its stamp of approval on a tainted, inherently unreliable sentence of death. There simply is no other conclusion that can be drawn.

4. This Court overlooked and totally failed to address one of the core issues presented by Van Poyck in this appeal, to wit, that the State's argument, and the jury's erroneous finding that Van Poyck was the triggerman deprived Van Poyck of his absolute state law and constitutional right to present the substantial mitigating fact that Van Poyck did not kill anyone. It is well established (and even the state conceded as much in its reply brief) that the fact that a defendant did not actually kill the victim constitutes powerful non-statutory mitigating evidence. *See, e.g., Zerquera v. State*, 549 So. 2d 189, 193 (Fla. 1989), and other cases cited in Appellant's initial brief at pages 21-22. A defendant's constitutional right to present non-statutory mitigating evidence is, of course, well established. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (a jury must be able to "consider and give effect to [a defendant's mitigating] evidence in imposing sentence"); *Johnson v. Texas*, 509 U.S. 350, at 381 (O'Connor, J., dissenting) ("A sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances"). Ironically, the Decision makes Van Poyck's case in stating that:

> The trial court found that the death penalty was an appropriate sentence

> because the mitigating evidence presented [at trial] was insufficient to outweigh the aggravating circumstances.

Dec'n p. 7. (Emphasis added). That is precisely Van Poyck's point. Had Van Poyck been able to present the substantial mitigating evidence that he did not kill anyone there is at least "a reasonable probability" that his jury and judge would have imposed a different sentence. This Court, in fact, reached this same conclusion in the remarkably similar case of *State v. Mills*, 788 So. 2d 249 (Fla. 2001), a case which this Court made no effort to distinguish from Van Poyck's case. This Court, in fact, did not cite a single case in support of its ultimate conclusion that there exists no reasonable probability that Van Poyck's jury and judge would have imposed a different sentence had they known that Van Poyck was not the triggerman.

This Court's unreasonable failure to address this key issue regarding the mitigational impact of Van Poyck's status as a nontriggerman duplicates this Court's error in *Parker v. Dugger*, 498 U.S. 308 (1991) by depriving Van Poyck of meaningful review of his death sentence. *See, Parker*, at 322 (reversing Florida Supreme Court's affirmance of a death sentence because Court failed to consider nonstatutory mitigating circumstances when reweighing the evidence). Accord, *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (finding State Supreme Court review unconstitutional because concurring state justices did not even mention mitigating evidence); *Caro v Woodford*, 280 F.3d 1247, 1256 (9th Cir. 2002) (court must consider improperly omitted evidence with the mitigating evidence and reweigh it against the aggravating evidence).

Moreover, this Court completely failed to address Van Poyck's assertion that in determining whether there exists "a reasonable probability" that Van Poyck's status as a nontriggerman would have resulted in a different sentence, the

Court must conduct a cumulative analysis of all existing mitigating evidence (i.e., that mitigation produced at trial, combined with the substantial mitigation uncovered during Van Poyck's 1992 post-conviction proceedings, in conjunction with the new mitigating evidence that Van Poyck was not the triggerman). See: pages 24-25 of Van Poyck's initial brief. Such a cumulative analysis is mandated by *Mills, supra*, as well as *McLin v. State*, 827 So.2d 948 (Fla. 2002), at 956 ("In making this [reasonable probability] determination, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial") (emphasis in original). In the case at bar, however, this Court did not even mention, much less weigh or analyze, any of Van Poyck's mitigating evidence – evidence never presented to the sentencing judge or jury – when it determined that there was "no reasonable probability" that the jury's and judge's knowledge that Van Poyck did not kill the victim would have resulted in a different sentence. Accordingly, Van Poyck moves this Court to reconsider its ruling and to weigh and take into consideration all of Van Poyck's cumulative mitigating evidence. Alternatively, Van Poyck moves this Court to clarify its opinion to explain how this Court reached its ultimate conclusion without considering or weighing any of Van Poyck's mitigating evidence.

5. Finally, the Decision, by upholding the death sentence while at the same time depriving Van Poyck of a critical mitigation factor, improperly substituted the Court for the jury in determining that there is "no reasonable probability" that Van Poyck would have received a different sentence had his jury and judge known that he was not the triggerman. See, pages 9-10 of opinion. This "reasonable probability" determination is, pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), a jury issue, and not one to be made by a reviewing court. Pursuant to *Ring*, Van Poyck has a Sixth Amendment right to have any valid factual predicate to his sentence determined by a jury. Van Poyck's jury erroneously believed

he was the triggerman, and was deprived of affirmative proof showing he was not. Consequently, re-hearing is compelled on this basis as well.

CONCLUSION

WHEREFORE, based upon the foregoing facts and arguments, as well as the record in this case, Van Poyck moves this Court to reconsider its decision dated May 19, 2005, and to grant Van Poyck the relief requested in his initial brief.

Respectfully submitted,

By:_____

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(3)

Case No. 05-751

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I. WHETHER CERTIORARI REVIEW IS WARRANTED TO REVIEW A STATE COURT'S RULING WHICH SOLELY INVOLVED APPLICATION OF A STATE DISCOVERY RULE ?

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TABLE OF CITATIONS

ADDITIONAL AUTHORITIES:

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TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below has been reported as Van Poyck v. State, 908 So.2d 326 (Fla. 2006)

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1257. Although this is the appropriate provision, the requirements of same have not been met.

STATEMENT OF THE CASE

The Florida Supreme Court entered its opinion on May 19, 2005. A motion for rehearing was denied on July 15, 2005. Petitioner is now seeking certiorari review in this Court.

STATEMENT OF THE FACTS

Van Poyck's status as the co-defendant who did not actually shoot the victim has been reviewed extensively over the past sixteen years. On direct appeal, the Florida Supreme Court made a factual determination that William Van Poyck was not the actual shooter of the victim.[1] However, the Court upheld the sentence of death based on petitioner's major participation in the underlying crime. The court found:

> We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In DuBoise v. State, 520 So.2d 260 (Fla. 1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is

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[1] On direct appeal, Van Poyck presented four claims addressed to the "triggerman" issue. He asserted: (1) the evidence against him was insufficient to support his conviction for premeditated first-degree murder (SR 35-45); (2) the trial court's Phase Two instructions failed to inform the jury of the mandatory Tison v. Arizona, 481 U.S. 137 (1987), and Enmund v. Florida, 458 U.S. 782 (1982), factual determination (SR 66-70); (3) the trial court erred in failing to make the required findings under Enmund/Tison in the sentencing order (SR 70-77); (4) the death sentence is not proportional because Van Poyck was not the triggerman (SR 99-101). Van Poyck v. State, 564 So.2d 1066, 1069-70 (Fla. 1990).

not the triggerman and discussed proportionate punishment, stating:

> In Tison the Court stated that Enmund covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death

> penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "*that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the* Enmund *culpability requirement.*"

Id. at 265-66 (citations omitted, emphasis added) (quoting Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). **Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdes arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional**.

Van Poyck, 564 So.2d 1066, 1070-71 (footnote omitted) *cert. denied*, 499 U.S. 932 (1991) (emphasis supplied).

Petitioner's non-triggerman status was again raised in two collateral state proceedings. The first was in a motion for postconviction relief.[2] Van Poyck v. State, 694 So.2d 686, 689

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[2] Van Poyck's postconviction claims regarding his non-triggerman status for sentencing purposes were as follows: "(6) the judge and jury weighed the invalid aggravating factors that the murder

(Fla. 1997), *cert. denied*, 522 U.S. 995 (1997), and the second was raised in a state habeas petition.[3] Van Poyck v. Singletary, 715 So.2d 930, 931 n.1 (Fla. 1998), *cert. denied*, 526 U.S. 1018 (1999). Van Poyck also sought relief in federal court. Therein he raised the issue that counsel was ineffective for failing to present forensic evidence that he was not the triggerman. All relief was denied. Van Poyck v. Moore, 290 F.3d 1318 (11th Cir. 2002), *cert. denied* 537 U.S. 812 (2003). The State accepts generally petitioner's rendition of the facts with the following three corrections, additions or clarifications. First, counsel did make a decision that he was not going to have any DNA testing done on the clothes that he and the co-defendant were wearing. Although trial counsel was granted a continuance to pursue DNA testing, he chose not to do so. He testified at the state evidentiary hearing that he decided not to have the clothes tested because the results may not be favorable. By leaving the question "unresolved" he could still make two closing arguments which would include the argument that co-defendant was the triggerman. Van Poyck v. State, 694 So.2d 686, 697 (Fla. 1997).

Second, the jury was given a special verdict form in this case. They were instructed to check the box for either "felony murder" or "premeditated murder" if the decision as to either theory was unanimous. The jury checked the box for felony

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was premeditated or that Van Poyck was the triggerman" and (11) *Edmund/Tison* errors necessitate a reversal of Van Poyck's death sentence." Van Poyck v. State, 694 So.2d 686, 698 (Fla. 1997). This Court found appellant's claims to be procedurally barred. Id at n. 6.

[3] In his habeas petition appellant raised the Enmund/Tison issue for a third time. Review was again denied: "This claim was raised and rejected on direct appeal, *Van Poyck*, 564 So.2d at 1070-71, and also on the rule 3.850 appeal. *Van Poyck*, 694 So.2d at 698." Van Poyck v. Singletary, 715 So.2d 930 (Fla. 1998).